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WASHINGTON REPORTS

VOL. 72

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

JANUARY 23, 1913 — APRIL 12, 1913

ARTHUR REMINGTON

REPORTER

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OF THE
SUPREME COURT OF WASHINGTON

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CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 10578. Department Two. January 25, 1913.]

ANTON DOLLAR, *Respondent*, v. NORTHWESTERN
IMPROVEMENT COMPANY, *Appellant*.¹

MASTER AND SERVANT—SAFE PLACE—GAS IN COAL MINE—NEGLIGENCE—VIOLATION OF STATUTE—EVIDENCE—SUFFICIENCY. In an action by a coal miner for injuries sustained in a gas explosion, plaintiff's statement that, if there had been enough air, the gas would not have accumulated in his working place, is a mere conclusion, and not sufficient evidence of negligence or of defendant's failure to comply with Rem. & Bal. Code, § 7381, requiring good ventilation and sufficient circulating air.

MINES AND MINING—USE OF SAFETY LAMPS IN COAL MINES—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7400, providing that only safety lamps shall be allowed or used in every working place of a coal mine where there is likely to be an accumulation of explosive gases or imminent danger therefrom, does not require the use of safety lamps where there had been no indication of gases until the instant of the accident, and where there was no evidence that there was likely to be an accumulation of explosive gases or imminent danger therefrom.

SAME—USE OF SAFETY LAMPS—EVIDENCE—ADMISSION BY COUNSEL. In an action for injuries sustained in a gas explosion in a coal mine, through failure to use safety lamps in working places where there was likely to be an accumulation of explosive gases, a retort by counsel during the trial that the mine was a gaseous mine, and that gas was likely to come quickly in some parts of it, is not an admission that will avail the plaintiff, in the absence of evidence that there was likely to be an accumulation of gases at the point in question.

Appeal from a judgment of the superior court for King county, Myers, J., entered May 7, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for

¹Reported in 129 Pac. 578.

personal injuries sustained by an employee through an explosion in a coal mine. Reversed.

C. H. Winders, for appellant.

H. M. Ramey, Jr., for respondent.

MAIN, J.—This is an action for damages for personal injuries. The respondent is a coal miner. The appellant is the operator of a coal mine at Ravensdale, Washington, known as mine No. 2.

On April 25, 1911, at the hour of about 5:30 o'clock a. m., the respondent, while at work in the mine, was injured by a minor gas explosion. His injury was painful but not permanent, and disabled him from work for a few weeks. The cause was tried before the court and a jury. At the conclusion of the respondent's evidence, the appellant challenged the legal sufficiency of the evidence and moved the court for a directed verdict. This being overruled, the appellant introduced in evidence a diagram of the mine wherein the accident occurred, and rested, and again moved the court for a directed verdict, which motion being overruled, the case was submitted to the jury, and a verdict returned for the respondent in the sum of \$550, upon which judgment was entered. Motion for judgment notwithstanding the verdict and a motion for new trial were made and overruled; from which the cause is brought here on appeal.

At the time of the accident, the level in mine No. 2, where the respondent was working, was being developed. There was a gangway driven both north and south from the entry. The development work at the time was in extending the north gangway, driving an airway fifty feet above and parallel with it, and driving chutes connecting the gangway and the airway. This work was being carried on by the men working in three shifts; the first working from seven a. m. to three p. m.; the second from three p. m. to eleven p. m.; and the third from eleven p. m. to seven a. m. Two men on each shift were engaged in extending the gangway, one in ex-

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tending the airway, and one the chute. The situation will be better understood by the examination of a diagram which was introduced in evidence and is set out herein.

A handwritten word "North" is written vertically along a diagonal line, likely indicating a direction or orientation for a diagram that is not fully visible.

The respondent was working in chute 16. Two men were extending the gangway and were at the point indicated by the letter A upon the diagram. One was engaged in extending the airway. There was also a motorman whose duty it was to drive the motor along the gangway. The air passed through the gangway until it reached the last open chute, and then through this chute into the airway, and through the airway out of the mine. The last chute being worked, shown on the diagram as 16, as well as the extension of the gangway beyond the last open chute, was supplied with air by what is known as a "booster" fan, which is set in the gangway and picks up the main volume of air and throws the same into the last chute and to the end of the gangway.

The respondent was the only witness who testified as to the manner of the accident and the method of doing the development work. He went to work on the third shift on the night of April the 24th, and worked in chute 16 from eleven p. m. until about 5:30 a. m., during which time he had driven this chute back approximately six feet. At this time he left the face of the chute where he was working, to go out into the gangway, and returned in from two to four minutes. Immediately upon his return, the explosion which caused the injury occurred. The respondent worked with an open light, as did all the other men employed upon this work. There had been no gas at any time during the working of the three shifts. The air was good, and the first indication of the presence of gas was the explosion itself.

The respondent, in paragraphs 4, 5, and 6 of his complaint, as grounds of negligence on the part of the appellant, alleges, (1) failure to provide a good and sufficient amount of ventilation; (2) that the air was not made to circulate through the shafts, levels, and working places of the mine; (3) failure to inspect on the day of the accident, or if an inspection were made and gas discovered, failure to note that fact on the bulletin board at the mouth of the mine; and

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(4) failure to withdraw all workmen from the portion of the mine wherein the accident occurred.

In Rem. & Bal. Code, § 7381, it is provided that:

“The owner, agent or operator of every coal mine, whether operated by shafts, slopes or drifts, shall provide in every coal mine a good and sufficient amount of ventilation for such persons and animals as may be employed therein, the amount of air in circulation to be in no case less than one hundred cubic feet per minute for each man, boy, horse, or mule employed in said mine, and as much more as the inspector may direct, and said air must be made to circulate through the shafts, levels, stables and working places of each mine, and on the traveling roads to and from all such working places.”

It will be noticed that this section of the statute requires, (1) that every coal mine shall have a good and sufficient ventilation; (2) the amount of air; and (3) that the air must be made to circulate. A careful reading of the record in this case demonstrates that there is no evidence supporting any of the above allegations of negligence in the complaint, or showing that the section of the statute above referred to had not been complied with, unless the answer of the respondent to a single question propounded to him by his counsel can be construed as evidence of negligence or of the neglect of duty imposed by the statute. On direct examination he testified, in effect, that if there had been enough air, the gas would not have remained in the chute where he was working. This is not evidence of a fact, but is a mere conclusion, and does not even specify the amount of air which the witness would deem sufficient for the purpose. The amount of air necessary cannot be measured by the judgment of the witness, but must be determined by the requirements of the statute. We think this evidence is not sufficient to send the case to the jury upon any of the above allegations of negligence, or upon a failure to comply with the prescribed statutory duty.

Paragraph 7 of the respondent's complaint alleges:

"That on said 25th day of April, 1911, plaintiff was working at a place in said level No. 2 at a point about fifty (50) feet from the face thereof, and about 5 a. m. on the said date, plaintiff had occasion to walk towards the face of said level, and while so doing, the light carried by him ignited the gas collected in said level, causing an explosion and thereby inflicting upon the plaintiff the injuries hereinafter set forth. That on the day of said accident to plaintiff as aforesaid, upon going to work in said mine, plaintiff was not furnished with a safety lamp, and was advised by the defendant that the same was not necessary or required, and was informed by the defendant through the notices on said bulletin board that said mine and the level on which he was to work were free from said gas. The plaintiff in no way contributed to the injuries sustained by reason of said accident."

Rem. & Bal. Code, § 7400, provides:

"In every working of a coal mine approaching any place where there is likely to be an accumulation of explosive gases, or in any working where there is imminent danger from explosive gases, no light, lamp, or fire other than a magnetic locked, air locked or lead lock safety lamp shall be allowed or used, except by mine superintendents . . . who may use such lamps as may be approved by the state mine inspector."

The appellant contends that, in paragraph 7 of the complaint, there is no allegation of negligence in the failure to require the use of a safety lamp, and that the allegation therein contained referring to safety lamps only goes to the effect of alleging that, on the day in question, the failure to furnish a safety lamp was an indication that the mine was not on that day gaseous. The complaint is not artfully drawn; but for the purposes of this decision we will assume, without deciding, that the allegation is sufficient. The question then arises, Did the defendant fail to furnish the plaintiff with a safety lamp as required by the statute? The measure of the appellant's duty is the statute. This court,

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in *Delaski v. Northwestern Imp. Co.*, 61 Wash. 255, 112 Pac. 341, said:

"The provisions of the statute measure the respondent's duty. The legislature, in recognition of the hazards of working in coal mines, has made careful provisions for their inspection, and imposed imperative duties upon those who own and operate them. The purpose of the law is to provide a reasonably safe place for the men to work. A failure to observe these provisions is negligence *per se*."

An inspection of the mine was made every morning before any of the men were permitted to enter it. If, from this inspection, it was discovered that the mine was gaseous, that fact would be noted on the bulletin board erected at the mouth of the mine. If the board was clear when the men went to work, it was, in effect, a declaration that the mine was free from gas. When the respondent entered the mine at the beginning of the third shift, on the night of April 24, 1911, the bulletin board was clear. As has already been stated, the men on all three shifts working in this level used open lights, and there was no indication of gases until the instant of the accident. The statute does not require the use of a safety lamp in all coal mines and at all events. But it does require the use of a safety lamp, (1) in the working of every coal mine "approaching any place where there is likely to be an accumulation of explosive gases;" or (2) in any working "where there is imminent danger from explosive gases." There is no evidence in the record which shows that the development work then being prosecuted was approaching a place where there was likely to be an accumulation of explosive gases, or that there was imminent danger from explosive gases.

But the respondent contends that the appellant admitted that this was a gaseous mine, and that this admission brings it within the statute. This contention is based upon a colloquy which took place during the trial, between the counsel for the respective parties, while the respondent was under

cross-examination. The appellant's counsel, being interrupted by counsel for the respondent, retorted in effect that it was a gaseous mine and gas was likely to come quickly in some parts of it. This retort, made in reply to a fortuitous interruption by opposing counsel, does not rise to the dignity of an admission. But if it were assumed that it did, it still is qualified in such a way as to be of no avail to the respondent. The evidence in the case was therefore not sufficient to raise a question of fact to be presented to the jury.

The motion for judgment notwithstanding the verdict should have been granted. The case will be reversed, and remanded with direction to the superior court to enter a judgment for the appellant notwithstanding the verdict.

MOUNT, ELLIS, and MORRIS, JJ., concur.

[No. 10450. Department Two. January 28, 1913.]

JOE PEARSON, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Evidence that an employee on a box car on a side track fell when "the roof felt like it went out," that something hit the car and what he was standing on "went out," and that an engine kicking cars might have hit it, and of another witness that something hit the train and jarred it, is not sufficient evidence to sustain a recovery on the theory that the box car was violently hit by an engine, there being no evidence that any engine was in the vicinity; since recovery cannot be based on speculation and conjecture (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Pierce county, Card, J., entered January 30, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee of a railroad while repairing box cars. Reversed.

¹Reported in 129 Pac. 573.

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Opinion Per MORRIS, J.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for respondent.

MORRIS, J.—Respondent was injured while in the employ of appellant, and brought this action alleging that his injury was caused by the appellant causing a train “to collide violently” with a string of six box cars standing upon a switch, and upon one of which he was at the time engaged in covering the roof with tar paper. The appeal is taken from a judgment following verdict in his favor.

The only question suggested by the appeal is insufficiency of the evidence to justify the verdict. It follows that, if there was any substantial evidence upon which the verdict can rest, it must be sustained. With this rule in mind, we have read the transcript of the testimony, and must hold that appellant’s claim of error is well taken. There is no evidence, as alleged in the complaint, that a train collided violently with the string of box cars upon the switch, causing respondent to be thrown from the car upon which he was working. At the time of the accident, and about 5:30 p. m., respondent was on the roof of the fourth car in the string, placing the tar paper upon the roof. These six cars were upon a switch near Winlock, and were used by a bridge gang as living quarters, one of them being a tool car, another being used as a kitchen and dining car. It was a wet day, and the tar paper was covered with mica dust, making it slippery. Respondent was standing in a stooping position about the center of the car, trying to shove the paper under a tin plate surrounding the smoke stack, when, as he says, “the roof felt like it went out and the next I knew they picked me up.” His testimony then proceeds as follows:

“Q. What moved the cars? A. Something hit it. Q. What hit it? A. I didn’t see. Q. What could hit it? A.

The engine when kicking cars. Q. Could anything else hit it? A. No sir, not to make it jar."

He then says he saw no engine, nor heard any; and in response to the question: "How do you know an engine struck the cars?" he replied: "I could feel when I was standing that it went out, what I was standing on;" that the car moved "like it struck;" could not say "how hard it hit." There is no evidence in this testimony that a train "collided violently," or at all, with these box cars. Respondent heard no train; saw no train. The only reference to any collision is "that an engine kicking cars could hit the string of box cars." This is not positive testimony of any degree that any engine did collide with these box cars. To say an engine could do it is no proof that an engine did do it. When stripped of its opinion and conjecture, respondent's evidence goes no farther than that something hit the cars hard enough to throw him to the ground. What it was is not disclosed. The respondent, nor any other witness in his behalf, testified to the presence of any engine near the scene of the accident, either before it happened or afterwards. It seems to us that, if the law does not require some evidence that an engine did do it, it would at least require some evidence that there was an engine working around there that could do it. But the evidence does not go that far. That respondent is only guessing at his engine theory is apparent from his answer to the question: "How do you know an engine struck the cars?" If there was any fact within his knowledge upon which to base his belief that it was an engine, it seems to us he would have given it in response to this question; but he answers it: "I could feel when I was standing that it went out, what I was standing on." This is nothing more than to say, because he fell off from the car upon which he was standing, or, using his own idiom, when what he was standing on went out from under him, he knew an engine had collided with the string of cars. We cannot see how one

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fact proves the other, or under what rule of law a jury should be permitted to say it does.

A brother of respondent was painting in one of these box cars. He says: "Something hit the train and jarred it." He felt the shock, but it did not affect him and he paid no attention to it. It also appeared that respondent was using a crowbar, saw, hatchet, hammer, wood chisel, and knife, in his work, and that some of these tools, the knife at least, were found upon the ground. That proves nothing save that the knife or other tools fell off. True, any jar sufficient to throw respondent off might cause the tools to fall. It would be equally true that respondent, losing his footing because of the wet and slippery mica dust, might have pushed them off in his fall. One guess is as good as another; there was no proof of either.

When counsel for respondent, in seeking to establish his case, asked: "What could hit it?" and depended upon a reply that an engine switching cars could, he brought this case within the rule of: *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881, and other supporting cases, where it has been said that it is not sufficient, in seeking to establish causes of injury, to show that there were causes which might have produced it, without showing that it could not have been produced in any other manner. In fact, respondent's case is not as strong as the plaintiff's case in any of those cited, for the reason that, while showing that an engine backing cars against this string of box cars could have produced a jar sufficient to cause him to lose his footing and fall, he failed to show that there was an engine doing such work, or to show any engine in that vicinity that could have done it. The jury was, therefore, left to speculation and conjecture to find a proximate cause for this injury which, in the language of Dunbar, J., in the *Armstrong*

case, "must not be confused with legitimate testimony," admitting that "it is true that the weight of the testimony is entirely for the jury."

We can see no escape from the conclusion that this case is controlled by the rule of the cited cases, and that, for the reasons here and there given, the court should have granted appellant's motion for judgment. These conclusions are strengthened by the testimony introduced by appellant, which it was not sought to dispute, that no switching had been done at this point that afternoon, and that, at the time of the accident, the switching engine and crew were "tied up" on a spur track near Winlock, some distance from the scene of the accident.

The judgment is reversed, and remanded with instructions to dismiss.

MOUNT, ELLIS, and MAIN, JJ., concur.

FULLERTON, J. (dissenting).—The opinion of the majority proceeds upon the assumption that it was incumbent on the respondent not only to prove that something struck the car upon which he was working with sufficient force to throw him therefrom to the ground, but the particular something that struck the car. But such is not the rule. This burden was not upon the respondent. The appellant, as the respondent's employer, was obligated to furnish him with a reasonably safe place in which to work, and to keep the place reasonably safe as long as the work continued. The respondent, therefore, made a *prima facie* case when he showed a violation of this obligation—when he showed that, while he was working on the top of the car in the manner directed by the appellant, something struck it, caused by no fault of his own, sufficiently hard to throw him therefrom to the ground. The burden of accounting for the accident is on the appellant; it is obligated to show that the striking of the car was caused by some act for which it is not responsible, if it is to be relieved from liability therefor; this is the

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necessary corollary of the rule which required it to keep the place of work furnished by it to the respondent reasonably safe. I think, therefore, that this court errs in holding that the judgment is not sustained by the evidence.

[No. 10452. Department Two. January 29, 1913.]

GUS SILBON *et al.*, *Appellants*, v. PACIFIC BREWING & MALTING COMPANY, *Respondent*.¹

REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EQUITY—JURISDICTION. Equity has jurisdiction to reform a written lease for mutual mistake, hence parol evidence of mistake is not inadmissible as varying the terms of a written contract.

SAME—EVIDENCE OF MISTAKE—SUFFICIENCY. The uncontradicted evidence of defendant's agent of a completed agreement, which by mistake was not incorporated in the terms of a written lease, as prepared by the plaintiff, is sufficient to authorize a reformation prayed for by defendant, under the rule that the evidence must be clear and convincing, even if the agent was negligent in failing to discover the mistake before executing the lease.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 13, 1912, upon findings in favor of the defendant, after a trial on the merits before the court, in an action on contract. Affirmed.

George W. Saulsberry, for appellants.

Burkey, O'Brien & Burkey, for respondent.

FULLERTON, J.—The appellants, who were plaintiffs below, brought this action against the respondent to recover the sum of \$420, alleged to be due under a certain written lease theretofore entered into between the parties. In the complaint it was alleged that the lease in question was entered into on March 15, 1911, and by its terms the appellants leased to the respondent certain premises owned by them, situated in the city of Tacoma, for a term of two years

¹Reported in 129 Pac. 581.

from and after April 1, 1911, at a monthly rental of \$160 per month, payable in advance on the first day of each and every month during the term of the lease; the lease being further conditioned for the payment of one hundred dollars as attorney's fees should the lessors or their agents institute proceedings in court to recover rents due thereunder. It was further alleged that the respondent entered into the possession of the property on April 1, 1911, and continued in possession thereafter under the lease, but failed and refused to pay rental for the first two months of the tenancy.

The respondent, in its answer, admitted the execution of the lease, but pleaded affirmatively that the same, by reason of a mutual mistake of the parties, did not express the actual agreement entered into between them, and asked that the lease be reformed so as to conform to such agreement; setting forth wherein the written lease did not conform to the lease actually entered into, and showing that, under the lease as actually entered into, there was nothing due to the appellants for the two months for which the appellants sought to recover.

A reply to the answer was filed and a trial entered upon, wherein the respondent, over the objection of the appellants, was allowed to introduce evidence substantiating the allegations of its answer. At the conclusion of the trial, the court made findings in favor of the respondent, and entered judgment reforming the lease and denying to the appellants the right to recover.

The appellants first assign that the court erred in permitting the introduction of evidence tending to show a mutual mistake in the execution of the lease, contending that to do so was to permit the terms of a written instrument to be varied by a contemporaneous parol agreement. But it is among the acknowledged powers of the courts to reform written instruments under circumstances such as were shown here. Where there has been an agreement actually entered into which the parties have attempted to put in writing, but

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have failed because of a mistake either of themselves or of the scrivener, the courts having jurisdiction in matter of equitable cognizance have power to reform the instrument in such manner as to make it express the true agreement; and this in any action or proceeding where a party to the agreement seeks to take advantage of the mistake. True, the evidence that there was such a mistake must be clear and convincing before the jurisdiction will be exercised, a mere preponderance of the evidence not being sufficient; but there is no question, in this jurisdiction at least, that the power to reform the instrument exists. *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210; *Preston v. Hill-Wilson Shingle Co.*, 50 Wash. 377, 97 Pac. 293; *Campbell v. Glazier*, 61 Wash. 520, 112 Pac. 490; *Rosenbaum v. Evans*, 63 Wash. 506, 115 Pac. 1054.

It is next contended that the evidence is insufficient to justify the judgment entered by the trial court, but on this question also we think the record is without error. The respondent's agent, who made the contract on behalf of the respondent, testified to a completed agreement prior to the preparation of the writing, and showed wherein the writing, which was prepared by the respondent, failed to express the agreement. There was no contradiction of his testimony on the main question, although there was evidence tending to show that the agent, when the written instrument was presented to him for execution, may have been somewhat negligent in failing to discover that it did not express the true agreement. But this alone is not sufficient to estop the respondent from having the instrument reformed.

The judgment is affirmed.

MOUNT, MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 10621. Department Two. January 29, 1913.]

SAMUEL K. SORENSON, *Respondent*, v. PERKINS & COMPANY,
Appellant, P. N. CHRISTIANSEN *et al.*, *Defendants*.¹

SCHOOLS AND SCHOOL DISTRICTS—ELECTIONS—NOTICE—SUFFICIENCY. A notice of a special school district election does not invalidate the election merely because it was not as full and complete as it might have been.

SCHOOLS AND SCHOOL DISTRICTS—POWERS—PURCHASE OF PLAYGROUND. A school district has power to purchase property for the purpose of a gymnasium and playground for the use of school children.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered April 6, 1912, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action to enjoin the payment of warrants issued by a school district. Reversed.

Kerr & McCord and *J. N. Hamill*, for appellant.

FULLERTON, J.—On December 9, 1911, a special meeting of the voters of School District No. 6 of Snohomish county was held, at which meeting the directors of the school district were directed to purchase certain specifically described tracts of land to be used by the children of such district “as a gymnasium and playground.” Acting pursuant to the direction so given, the board of directors purchased the lots described from the owner thereof, taking title thereto in the name of the district, and issued to such owner two warrants aggregating \$550, drawn on the funds of the district, in payment thereof. These warrants were duly presented to the county treasurer for payment, but the treasurer, conceiving that he had no funds applicable to their payment, endorsed them as required by statute and returned them to the

¹Reported in 129 Pac. 577.

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Opinion Per FULLEBTON, J.

holder. Subsequently the warrants were purchased by the appellant in the present action.

After the purchase of the warrants by the appellant, this action was begun by the respondent to enjoin their payment. In his complaint the respondent alleged, in substance, that the warrants were illegal and void for want of regularity in their issuance, and because issued as the purchase price of property acquired for a purpose not authorized by law. To the complaint the appellant answered, setting out in detail the proceedings leading up to the issuance of the warrants. To this answer a demurrer was interposed, which the trial court sustained. Subsequently a judgment was entered enjoining the payment of the warrants, the judgment being rested on the ground "that the action of said school district in purchasing said lots for the purposes aforesaid and in issuing said warrants was *ultra vires* and of no legal effect, and that said warrants were and are null and void." This appeal is prosecuted from the judgment so entered.

As the respondent has not favored us with a brief, and as the complaint does not specifically point out the objections to the school meeting at which the purchase of the land was directed, we are uncertain what constitutes the particular irregularity in the proceedings that is thought to render them void. We have examined the proceedings, nevertheless, in the light of the statute, and can find nothing therein which seems to us to justify the conclusion that they are either irregular or void. The notice of the meeting given by the clerk may not have been as full as could be made, but it is sufficient under the rule laid down in *Regan v. School District No. 25*, 44 Wash. 523, 87 Pac. 828, and *State ex rel. School District No. 56 v. Superior Court*, 69 Wash. 189, 124 Pac. 484.

The case last cited is conclusive also of the principal question in the case. We there held that school districts could exercise the power of eminent domain to acquire land for the use of school children as an athletic field and general play-

ground; and certainly, if it be within the power of the school district to acquire land for these purposes by condemnation proceedings, it is within its powers to purchase land on which to erect a gymnasium and construct a playground.

The judgment appealed from will therefore be reversed, and remanded with instruction to the lower court to overrule the demurrer to the answer and proceed to a final determination of the cause.

MOUNT, ELLIS, MORRIS, and MAIN, JJ., concur.

[No. 10591. Department Two. January 29, 1913.]

J. G. TAYLOR, *Respondent*, v. A. B. KIDD, *Appellant*.¹

PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In an action for malpractice the negligence of the defendant is for the jury, where it appears that the defendant treated plaintiff for severe injuries sustained by a fall which included injury to his shoulder, that the shoulder was not then dislocated, but the arm not improving, was subjected to manipulation by the defendant, which dislocated the shoulder, discovered by other physicians, and which required an operation and resulted in a shortening of the arm.

EVIDENCE—EXPERT EVIDENCE—OPINION AS TO MEDICAL TREATMENT—HYPOTHETICAL QUESTIONS. In an action for malpractice, expert medical witnesses may express opinions, based upon a hypothetical question containing a fair summary of the facts shown by plaintiff's evidence, as to whether the treatment given plaintiff was such as an ordinary skillful physician in that community would have used for plaintiff's injury.

TRIAL—INSTRUCTIONS—WRITTEN INSTRUCTIONS—WAIVER—EXCEPTIONS—TIME FOR TAKING. Where, in addition to written instructions, an oral explanation was requested and given, without objection or exception at the time, a written exception filed later on the ground that the same was not reduced to writing and given to the jury, comes too late; since the statute authorizing exceptions to instructions at any time before motion for new trial relates to their sufficiency as matter of law, and not to the manner in which they are given, and since the statute requiring the instructions to be given in writing may be waived.

¹Reported in 129 Pac. 406.

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Opinion Per FULLERTON, J.

PHYSICIANS AND SURGEONS—MALPRACTICE—EXCESSIVE VERDICT. A verdict for malpractice is excessive, where it indicates that the jury considered plaintiff's entire loss, through a fall for which he was treated, instead of merely the consequences of the doctor's negligence.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 30, 1912, upon the verdict of a jury rendered in favor of the plaintiff for \$5,500, for malpractice. Reversed, unless \$2,000 is remitted.

C. R. Hawkins and Peters & Powell, for appellant.

Douglas, Lane & Douglas, for respondent.

FULLERTON, J.—On March 6, 1909, the respondent, Taylor, while working on the roof of a house, fell therefrom to the ground, a distance of about twenty-five feet, and received severe and painful injuries. He employed the appellant, a physician and surgeon, to attend him. The physician found him suffering with two broken ribs, a severe strain of the left shoulder, and various contusions upon his body. The doctor immobilized the shoulder and ribs, accorded the contusions the usual treatment, and put the patient to bed, where he remained for some little time. Later on the patient was able to get up and move about, and seemingly gradually improved, until the latter part of June, 1909. At this time his broken ribs had adhered, the contusions on his body had healed, and he had acquired some use of his injured shoulder. His shoulder, however, was not thought to be making satisfactory progress, the arm had very little motion, and attempts to manipulate it caused pain, and it had also become somewhat atrophied. The doctor diagnosed the trouble with the arm as an adhesion of the fibrous tissue surrounding the glenoid cavity of the scapula, in which the head of the humerus articulates. This he had endeavored to reduce by massage and manipulation, but without success. In the early part of July the appellant advised the respondent that a more rigorous manipulation of his arm than could be had

without the use of an anaesthetic was necessary in order to break up the adhesions, and appointed a time for the patient to meet him at his office and receive such treatment. The respondent attended at the office at the time appointed and received one such treatment, which gave him some pain and caused considerable swelling in the arm and shoulder. Thereafter, on July 17, 1909, when the pain and swelling from the first treatment had somewhat subsided, the respondent went to the office a second time, and his arm was subjected to a further and more rigorous manipulation by the appellant and his assistant, Dr. Mason.

This last operation left the arm in an inflamed condition and much swelling and pain resulted, causing the patient to take to his bed where he was confined for about ten days. Between this date and August 5 following, the appellant visited him almost daily, and such times as his arm would admit of it, subjected it to movement and manipulation. On the last named date, the appellant discontinued the manipulation, prescribed treatment for reducing the swelling and inflammation, and told the patient to come to his office as soon as the swelling should be reduced, when he would examine his shoulder with an X-ray. The respondent, however, did not call again at the appellant's office, but on September 6, 1909, consulted with another surgeon in Seattle, a Dr. Bates, who subjected him to an X-ray examination. The plate disclosed a dislocation of the shoulder joint, the head of the humerus projecting downward and inward. To correct the difficulty, Dr. Bates advised a surgical operation on the shoulder, which he afterwards performed with the assistance of a Dr. Hanley. On cutting into the shoulder, the doctor found the head of the humerus in a friable and porous condition, so much so that it was deemed necessary to cut away the end of the humerus for some two and one-half inches. After removing this portion of the humerus, the end remaining was set back into the shoulder cavity and the wound inclosed and dressed. At the time of the trial, the wound had entirely healed, the arm, while

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much shorter than it was originally, had recovered much of its lost motion and usefulness, having, as the doctor stated, perhaps, seventy-five per centum of its original power and scope of motion.

The respondent instituted this action on March 29, 1911, against the appellant for malpractice. In his complaint he alleged the fact of his injury, the employment of the appellant to treat the same, and the manner of appellant's treatment thereof; alleging as negligence that the appellant dislocated his arm on July 17, 1909, while attempting to break up the adhesions arising from the disuse of the arm following the original injury. Issue was taken on the complaint and a trial had, which resulted in a verdict against the appellant in the sum of \$5,500. From the judgment entered thereon, this appeal is prosecuted.

The appellant first assigns that the court erred in refusing to sustain his several challenges to the sufficiency of the evidence; arguing that the evidence fails to show that he did not treat the injury of the respondent with that ordinary diligence and skill which physicians and surgeons, practicing in the same and similar communities, ordinarily exercise in like cases. But we think there was on this question sufficient evidence to make a case for the jury. Aside from the general outline of the evidence which we have heretofore given, there was the positive evidence of a physician who examined the arm shortly prior to July 17, 1909, that there was then no evidence of dislocation, and it will be remembered that this was also the appellant's original diagnosis. There was, therefore, evidence from which the jury could well have found that the appellant dislocated the respondent's arm in his endeavor to remedy its ankylosed condition following the original injury; and the fact of such dislocation, and the further fact that he did not discover the dislocation at the times he subsequently manipulated the arm, was clearly evidence that he did not exercise the diligence and skill required of the ordinary physician and surgeon. For such injury as the re-

spondent suffered because of such lack of diligence and skill, he was, of course, entitled to recover from the appellant.

The respondent was permitted, over the objection of the appellant, to propound to his expert witnesses certain questions containing a summary of the facts the evidence on his part tended to establish concerning the treatment accorded the respondent by the appellant, and an inquiry whether the treatment thus accorded was such treatment as an ordinary skillful physician, practicing in the community in which the appellant practiced, would bring to the care of such an injury. This is assigned as error, because, it is argued, it allows the witness to determine the very question the jury is empaneled to determine. But we think the questions not objectionable on the ground stated. The question whether the treatment accorded the respondent's injury by the appellant came up to the standard of ordinary care and skill was not a question within the knowledge of persons of ordinary learning and experience, and hence, a jury selected from such persons could not know, from the mere description of the treatment, whether or not it was reasonably careful and skillful. It was therefore proper to call on persons, learned in the particular science and familiar with the proper practice in like cases, to state whether, in their opinion, the treatment met the prescribed standard, and this even though the question whether or not it does meet the required standard is the ultimate question for the jury to determine. This question was before us in *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626, concerning which we said:

"The hypothetical question complained of was a fair summary of the facts which the respondent's evidence tended to prove. True the question embodied the very fact that was ultimately to be found by the jury, but this does not render it incompetent. To reach their final conclusion the jury were compelled to draw an inference from the facts proven which involved a question of medical science; that is to say, after all of the facts had been given in evidence, it was still a question whether the disease could be communicated in the

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manner recited, and as that question involved a matter of medical science, it was proper to submit to the jury on the question the opinion of an expert versed in that science."

The rule as thus stated is also the general rule. The question arose in *Quinn v. Higgins*, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305, passing upon which the court observed:

"The question of negligence and carelessness on the part of the surgeon in the treatment he gave the plaintiff's leg, while it is one which the jury must necessarily determine upon the whole evidence in the case, is still a question which must be determined mainly upon expert evidence. Certainly the claimed misconduct of the surgeon is not so flagrant that a man entirely ignorant of surgery can form an intelligent judgment as to the propriety or impropriety of the treatment given by the defendant, unaided by evidence of men skilled in surgery and having superior knowledge as to what treatment should have been given to the broken leg under all the circumstances. The defendant was therefore entitled to show, if he could, by witnesses having superior knowledge and skill in surgery, that the treatment he gave the plaintiff's leg was such as a surgeon of ordinary knowledge and skill in his profession would and ought to have given. The exclusion of any material evidence of the expert witnesses offered by the defendant which had a direct tendency to show that his treatment was proper, and such as a surgeon of ordinary learning and skill in his profession would have adopted in the case, must necessarily prejudice the defendant"

So in *Jones v. Angell*, 95 Ind. 376, it is said:

"The opinion of an expert in any art, science, trade, profession or mystery may be given where it is proper for the decision of a question relating to the issues in the case."

In *Challis v. Lake*, 71 N. H. 90, 51 Atl. 260, it is said:

"The hypothetical question addressed to the expert, Dr. Galvin, was unobjectionable. Upon an assumed statement of facts, suggested by the evidence, he was asked, in substance, what in his opinion ought reasonably to have been done by the attending physician; that is, what treatment a reasonably skillful physician would have adopted in such a case.

The competency of the question is so apparent as to admit of no serious discussion. *Spear v. Richardson*, 37 N. H. 23, 24; *Perkins v. Railroad*, 44 N. H. 223; *Wells v. Iron Co.*, 48 N. H. 491, 513, 540."

And in *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, it is said:

"The first assignment avers error in permitting the medical witnesses, who testified in behalf of the plaintiff, to be asked whether the examinations made by them 'were made in a superficial or in a careful and thorough manner.' . . .

"The second ground, that this question called for the opinion of the witnesses as to the manner in which the physical examinations were made, and thus supplanted the judgment of the jury in that particular, does not seem to us to be well founded. The obvious purpose of the question was to disclose whether the judgment of the physicians as to the plaintiff's condition was based on a superficial or on a thorough examination, and we think it was competent for the witnesses, who were experts, to characterize the manner of the examination."

The two cases last cited, it is true, do not present the exact question at bar, but we think they are clearly analogous. If it be competent for an expert medical witness to state what treatment a reasonably skillful physician would have adopted in a given case, or to give his opinion whether his examination of a person's condition was superficial or thorough, clearly he may give it as his opinion whether a given treatment was or was not ordinarily careful and skillful. For other cases supporting the rule, see: *Olmsted v. Gere*, 100 Pa. St. 127; *Jones v. Angell*, *supra*; *Wright v. Hardy*, 22 Wis. 334.

The trial judge reduced his charge to the jury in writing, and at the conclusion of the evidence, read the same to the jury. After he had concluded the reading, the respondent's counsel suggested a question on which he thought further explanation necessary, whereupon the judge gave an oral instruction on the matter. The oral instruction was taken down by the stenographer who was present, but was not

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reduced to writing and given to the jury along with the general written instructions when they retired to consider of their verdict. Neither party at the time took exceptions either to the form or matter of the instruction, or requested that it be reduced to writing and given to the jury. The appellant, however, prior to the hearing on the motion for a new trial, filed a written exception to this particular instruction, on the ground that it was not reduced to writing and sent to the jury room along with the other instructions of the court. But we think the exception came too late. While it is true the statute provides that exceptions to the instructions of the court may be taken at any time before the hearing of a motion for a new trial, we think this must relate to exceptions to the sufficiency of the instructions as matter of law, and not to the manner in which they are given. The statute requiring instructions to be given in writing prior to the arguments of counsel to the jury, and requiring that they be sent to the jury room along with the pleadings and exhibits in the case, is not mandatory in the sense that the parties cannot waive the requirements. On the contrary, it is a common practice to waive some or all of them; and a party must be held to have waived them when he does not note his dissent at the time the breach of the rule is committed. This principle is not contrary to the rules in *Raynor v. Tacoma R. & Power Co.*, 70 Wash. 133, 126 Pac. 91. There exceptions were timely taken to the action of the court, but the court refused to correct its mistake after the opportunity for it to do so had been afforded. Here no such opportunity was given, and we think the severe penalty of a retrial of the cause should not be visited upon the successful party because of a mistake the fault of which lay equally upon all the parties.

Finally, it is said that the verdict is excessive. With this contention we are constrained to agree. The size of the verdict would indicate that the jury felt inclined to visit the entire loss suffered by the respondent upon the doctor, whereas he

was only responsible for the injury and suffering caused by his own acts, not those caused by the original injury with which he had nothing to do. It is not, however, necessary to award a new trial in the first instance. If the respondent will, within thirty days after the remittitur from this court reaches the lower court, consent in writing to remit two thousand dollars from the amount of the judgment, the judgment will stand affirmed for the sum remaining; namely, three thousand five hundred dollars. Otherwise a new trial will be awarded.

MOUNT, MORRIS, ELLIS, and MAIN, JJ., concur.

[No. 10058. Department One. January 31, 1913.]

J. C. LEVOLD, *Appellant*, v. J. R. STIRRAT *et al.*,
Respondents.¹

APPEAL—BRIEFS—FAILURE TO FILE—DISMISSAL. Prejudice will be presumed, and an appeal dismissed, where there has been a delay of more than fifteen months in filing briefs.

Motion to dismiss an appeal from a judgment of the superior court for King county, Gay, J., entered May 11, 1911, upon sustaining a demurrer to the complaint, dismissing an action on contract. Granted.

John H. Perry, Hammond & Hammond, and *Walter Schaffner*, for appellant.

Wm. Martin, for respondents.

PER CURIAM.—This cause is before us upon the respondents' motion to dismiss the appeal. The final judgment was entered in the superior court on May 11, 1911. Notice of appeal was given on August 7, 1911, and the respondents' motion is based upon the failure of the appellant to file

¹Reported in 129 Pac. 406.

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any briefs within the time required by law. The delay in filing the briefs, which is unexplained, has extended over a period of more than fifteen months. The delay has been so great that prejudice will be presumed, and we therefore conclude that the appeal should be dismissed. It is so ordered.

[No. 10453. Department One. February 1, 1913.]

JOE CHENIER *et al.*, *Respondents*, v. INSURANCE COMPANY OF NORTH AMERICA, *Appellant*.¹

INSURANCE—CONTRACT TO INSURE—ORAL CONTRACT OF AGENT. An oral contract by agents for an insurance company to renew a policy upon its expiration, renders the company liable for damages sustained on failure to issue the policy, where the property was subsequently destroyed.

INSURANCE—CONTRACT TO INSURE—ACTIONS—CONDITIONS PRECEDENT—PROOF OF LOSS—LIMITATIONS—WAIVER. In an action against an insurance company for damages sustained by reason of its failure to issue a policy of fire insurance, pursuant to an oral agreement therefor, conditions precedent to an action upon the prospective policy requiring proofs of loss and that suit be commenced within twelve months, are not a defense; since conditions that would have been contained in the prospective policy are waived by denial of the contract and failure to issue the policy.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 13, 1912, upon the verdict of a jury rendered in favor of the plaintiffs. in an action on contract. Affirmed.

Hathaway & Alston, for appellant.

Alexander & Bundy, for respondents.

PARKER, J.—This is an action to recover damages in the sum of \$500, alleged to have resulted to the plaintiffs from a breach of a contract on the part of the defendant by which it agreed to execute a policy of insurance upon a building owned by them. A trial resulted in verdict and judg-

¹Reported in 129 Pac. 905.

ment in favor of the plaintiffs for the amount claimed, from which the defendant has appealed.

The contentions of counsel for the respective parties rest upon facts as to which there is no substantial dispute. Respondents had an insurance policy for \$500, executed by appellant upon their building. This policy by its terms expired on January 1, 1909. On September 1, 1908, respondents entered into an oral contract with appellant through its agent, by which it agreed that, upon the expiration of the policy on January 1, 1909, a new policy should be executed; in other words, that the insurance should then be renewed. There was some evidence tending to show that respondents had a sufficient amount of return premium due them in the hands of the agent, from other cancelled policies, to pay the premium upon the new policy to be issued January 1, 1909, and that it was understood that such sum should be applied in payment of the premium upon the new policy. It seems probable that the jury concluded that the premium was paid upon the new policy in this manner. But, however that may be, it is plain that the jury was warranted in concluding, and did conclude, from the evidence that the contract for the new policy to be issued January 1, 1909, was actually made and became a binding contract. Indeed, it is not now seriously disputed but that the verdict of the jury became conclusive upon the existence of this contract, though its existence was denied by appellant's answer and strenuously contested at all times up to the rendering of the verdict. On January 10, 1909, ten days after the agreed time for the issuing of the new policy, the building was destroyed by fire.

The evidence is somewhat in conflict as to respondents' giving notice to the agent of the destruction of the building by fire, and as to the claim made against appellant by respondents prior to the commencement of this action. It is, however, undisputed that respondents never tendered to appellant any proof of their loss. This action was commenced

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on April 15, 1910, which it will be noticed was more than twelve months after the date of the fire. In addition to its denial of the making of the contract, appellant affirmatively alleged in defense that it never issued an insurance policy which did not contain a provision that, "if fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, . . . and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interests of the insured and all others in the property, the cash value of each item thereof and the amount of loss thereon." Also, that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." Also, that the plaintiffs had knowledge of the fact that all fire insurance policies contain such provisions; that the plaintiffs never made any proof of loss, and that more than one year elapsed between the date of the fire and the commencement of this action. Respondents demurred to this affirmative defense, which demurrer was sustained by the trial court. Therefore no evidence was introduced by appellant to sustain its affirmative defense. Respondents, however, did introduce in evidence the original policy of insurance, which contained provisions substantially as pleaded in appellant's affirmative defense. It also appears from the evidence introduced by respondents that none of the conditions relied upon by appellant in its affirmative defense were complied with. We therefore have before us all of the facts necessary to the maintenance of appellant's affirmative defense, if such facts constitute a defense.

The controlling question here is, Are respondents precluded from recovering because of their failure to comply with

conditions precedent to recovery which would have been contained in the policy had it been issued in compliance with the contract? No doubt if such policy had been issued and this were a suit thereon to recover the amount of the insurance evidenced thereby, respondents would be so precluded, unless appellant had in some manner waived the conditions to be performed by respondents as a prerequisite to such recovery. But this is not a suit upon such policy; nor is it a suit upon an oral contract of insurance. It is a suit for damages because of the failure of appellant to execute a contract of insurance as it agreed to do. It is true, as insisted upon by counsel for appellant, that "it will be presumed that they contemplated such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties." *Eames v. Home Ins. Co.*, 94 U. S. 621, 629. But the general rule seems to be that a failure on the part of the insurer to issue a policy in pursuance of such a contract constitutes a waiver of conditions precedent to be performed by the insured, which the policy if issued would have contained. It also seems to be the general rule that a denial by the insurer of the existence of such a contract, whether it be for insurance, that is, a contract for a policy to be issued, or a contract of insurance strictly speaking, constitutes a waiver of conditions precedent to be performed by the insured. These general rules are apparently not adhered to by all of the courts though we think they are supported by the decided weight of authority. In *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941, we said:

"Appellant next contends that respondent cannot recover because no proofs of loss were made. We may assume that, under an oral contract of insurance, the usual conditions of written contracts of insurance are to be followed, and we may also assume that no formal proof of loss was furnished by the respondent to the appellant. Still the rule is that, when a contract is repudiated, as in this case, on the ground that there is no contract and no liability, before the time expires

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for furnishing such proofs, such denial of liability is a waiver of the proof of loss;" citing authorities.

In the recent case of *Hatcher v. Sovereign Fire Assur. Co.*, 71 Wash. 79, 127 Pac. 588, we held that the waiver will be effectual, although the act or conduct of the insurer relied upon to constitute such waiver is subsequent to the time fixed by the policy within which proof of loss must be furnished. True, in that case the waiver did not arise from a denial of the existence of the contract on the part of the insurer, but we are unable to see that conduct consisting of a denial of the existence of the contract, made after the prescribed time for furnishing proof, is not as effectual to relieve the insured from making proof of loss as such a denial on the part of the insured made before such time would be. In either event, such denial is wholly inconsistent with the necessity of proof. The offer of proof in one case is as vain and useless as in the other, and this apparently is the reason upon which the rule rests. These decisions seem to effectually dispose of appellant's contentions, in so far as they rest upon respondents' failure to furnish proof of loss.

Since the appellant also rests its defense upon respondents' failure to commence this action within twelve months after the occurrence of the fire, as the conditions of the policy, if issued, would have required, it becomes necessary to follow learned counsel's contentions further, and ascertain whether such limitation as to the time of commencing an action is any more binding upon respondents or less capable of being waived by the insured than the conditions as to furnishing proof of loss. Now, if the condition to be contained in the prospective policy as to furnishing proof of loss within a certain time is ineffectual as against respondents because of appellant's denial of the contract and failure to issue the policy, it would seem that other conditions precedent to recovery, to be contained in the prospective policy, would be equally ineffectual upon denial of the contract and failure to issue the policy.

While it seems clear to us that this is a contract for the issuing of a policy of insurance, that is, a contract for insurance rather than a contract of insurance strictly speaking, we think it unnecessary to dwell upon the technical distinction differentiating such contracts which is sometimes noticed by the authorities. The practical importance of this distinction does not seem to have been recognized by the decisions of the courts to the extent one might expect from the statement of the general rule found in the authorities. This is, at least, true where there has been under consideration an oral contract and the question of giving force to conditions precedent to be contained in the prospective policy. That is, the question of waiver or rendering effectual of such conditions by denial of the contract, and failure to issue the policy, has not, in all adjudicated cases, been rested upon the technical distinction between contracts for insurance and contracts of insurance. Now, it would seem that, if such prospective conditions would be binding in any case upon the insured under an oral contract, they would be where the oral contract is one of insurance contemplating the issuance of a policy as further evidence of the contract, yet even in such cases, a majority of the decisions seem either to ignore the distinction between oral contracts for insurance and oral contracts of insurance, or else to hold the conditions waived by the insurer by its failure to issue the policy.

We will now notice some of the decisions applying the law to the facts of particular cases. In *Hardwick v. State Ins. Co.*, 20 Ore. 547, 26 Pac. 840, there was involved an oral contract. The insured had a policy issued by the defendant, which was of questionable validity by reason of defective description of the property. This policy was by agreement cancelled, with the understanding that a new policy should be issued as soon as could conveniently be done. It was agreed that, since the new policy could not be immediately issued as it had to be procured by mail from a distance, the insurance should commence July 20, 1889, the date of the

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agreement, as though the policy had been then actually issued and delivered, and that the new policy should run from that date. About a month later the property was destroyed by fire, at which time the new policy had not been issued, and thereafter the insurer refused to issue the new policy and refused to pay the loss. Apparently one of the conditions of the prospective policy was that the insured must commence an action to recover for loss within six months from the date of the loss. Disposing of the contention that this condition was binding upon the insured, the court said:

"In the ruling of the court sustaining the motion to strike out that portion of the answer alleging that the action was not commenced within six months after loss, and in refusing to give the instruction asked by defendant to the same effect, there was no error. This action is not based upon the terms of any policy, but upon the breach of a contract. Although plaintiff testified that the policy to be issued was to be in terms the same as the former one, except as to length of time and amount of premium, defendant refused to issue or deliver the policy according to the contract, and hence this action. Having failed to issue the policy, it can claim no exemption from liability on account of any provisions the policy might or would have contained had it been issued."

It is difficult to escape the conclusion that that contract was one of insurance rather than one for insurance, though the court seems to have ignored such distinction and based its decision upon the ground of waiver upon the part of the insurer by its failure to issue the policy. This is the only decision coming to our notice involving the waiver of or rendering ineffectual a condition limiting the time for commencing suit to recover the loss, to be contained in a prospective policy, by a failure to issue such policy in pursuance of an oral contract. In *Sproul v. Western Assur. Co.*, 33 Ore. 98, 54 Pac. 180, there was involved an oral contract contemplating the issuing of a policy in usual form. The policy would have contained conditions rendering it void if

the property was, or should become, encumbered by mortgage. The property was so encumbered, and was destroyed by fire before issuance of the policy. Answering the defense made by the insurer that the right of the insured to recover was defeated by failure of the insured to comply with conditions which would have been contained in the prospective policy if issued, the court said:

"Where the existence of a contract to insure is flatly denied, and the issuance of the policy is refused and withheld, the company should be held to have waived such conditions as are calculated to void it at the very moment of its execution, unless it has given ample notice to the assured that they will not only be contained in the policy, but insisted upon, in case the facts which are supposed to give rise to the stipulations prove to be falsely represented. So it is as it respects those conditions which the assured is required to observe in order to perfect his remedy against the company."

In *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. 423, there was involved an oral contract which the court regarded as a contract of insurance, and not simply a contract to issue a policy of insurance. Disposing of the defense that the proof of loss had not been made as would have been required by the conditions of the prospective policy, the court said:

"Soon after the fire the company denied that any contract of insurance existed by refusing to issue a policy. When the company refused, upon request, after the loss, to issue a policy based upon the oral agreement, it in effect denied any liability, and proofs of loss were not required as conditions precedent to bringing suit."

The following decisions are also in harmony with these views: *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390; *Gold v. Sun Ins. Co.*, 73 Cal. 216, 14 Pac. 786; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Baile v. St. Joseph Fire & Marine Ins. Co.*, 73 Mo. 371.

It may be suggested that the decisions rest to some extent upon want of knowledge in the insured of the conditions

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which would be contained in the prospective policy. For instance, such fact is noticed in the Missouri cases above cited. However, that such fact is not controlling seems to be plain, in view of the fact that the Oregon, Indiana, and California cases above cited deal with contracts for renewal of policies. Of course, in such cases the insured knew what the conditions of the prospective policies would be, and yet the insured were held not bound thereby, because the contracts were denied and the policies never issued.

We will now notice the decisions upon which counsel for appellant place their principal reliance. In *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, there was involved an oral contract which a majority of the court regarded as a contract of present insurance. The parties to that contract no doubt contemplated the issuance of a policy; but whether or not they did in fact so contemplate, the statutes of New York then in force prescribed a standard form of insurance policy, the terms of which, by operation of law, became a part of the contract. A majority of the court held that the conditions specified in the statutory policy must be complied with by the insured as a prerequisite to his right of recovery. Three of the judges of that court dissented from the majority opinion, upon the ground of waiver of those conditions by the failure of the company to issue the policy in compliance with the contract. It is also worthy of note that that decision reversed a decision of the appellate division of the supreme court, which decision was concurred in by all of the five judges of that court. *Id.*, 13 App. Div. 444, 43 N. Y. Supp. 623.

In *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, there was involved a binding slip, as it was called, being a memorandum evidencing what the court regarded as a contract of present insurance. The court held that the insured was bound by all of the conditions of the prospective policy as if it had been issued. But while these decisions do not seem to be in harmony with all of those above

noticed, they nevertheless are not necessarily in conflict with our holding in this case in favor of the respondents, because there is here involved a contract which is not a contract of present insurance, but a contract for the issuance of an insurance policy at a future time. The only decision called to our attention which is seemingly in direct conflict with this view is that of *Barre v. Council Bluffs Ins. Co.*, 76 Iowa 609, 41 N. W. 373.

We feel constrained to follow what we regard as the decided weight of authority, and hold that the failure of appellant to issue an insurance policy in pursuance of the contract which the jury found to exist in this case, rendered wholly ineffectual as against respondents the conditions which would have been contained in the prospective policy had it been issued, requiring the respondents to furnish proof of loss within a certain time, and requiring the commencement of an action to recover upon the policy within one year from the date of the fire.

The judgment is affirmed.

Crow, C. J., Gose, and Mount, JJ., concur.

[No. 10727. Department One. February 1, 1913.]

JOHN H. SCOTT, *Respondent*, v. C. H. GUIBERSON,
Appellant.¹

EXECUTION—SALE—CONFIRMATION—MATTERS AND OBJECTIONS CONSIDERED—CLAIM OF HOMESTEAD. In view of Rem. & Bal. Code, § 591, providing that the only objections to be considered upon the confirmation of an execution sale are such as go to the regularity of the proceeding, the claim of the judgment debtor to a homestead cannot be heard or tried upon the hearing for confirmation of the sale, upon the mere filing of a declaration of intention as to unoccupied land.

SAME—CONFIRMATION OF SALE—IRREGULARITIES—APPRAISEMENT OF HOMESTEAD. The failure, upon an execution sale, to make an ap-

¹Reported in 129 Pac. 886.

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praisement of a homestead claim is not an irregularity, where no homestead claim was asserted or declaration of intention filed at the time of the levy, pursuant to Rem. & Bal. Code, § 591.

Appeal from a judgment of the superior court for Thurston county, Yakey, J., entered March 26, 1912, in favor of the plaintiff, confirming a sale on execution, after a hearing before the court. Appeal dismissed.

Edwin F. Masterson and Allen Weir, for appellant.

Thomas M. Vance and Harry L. Parr, for respondent.

CHADWICK, J.—Plaintiff Scott secured a judgment against the defendant Guiberson. Thereafter Guiberson came into a devise of some real property situate in Pierce county. Execution was levied upon this property, which was wild, unoccupied, and unenclosed. Thereupon defendant filed a declaration of homestead, saying:

“Said land is at the present time in a wild and uncultivated condition, and there are no buildings of any character on said land; that as rapidly as my means will permit I am placing said land under cultivation and intend to erect thereon a residence suitable for the occupancy of myself and family; . . . That it is my intention to use and claim the said lots of land and premises above described, together with the dwelling house to be erected thereon, and its appurtenances, as a homestead;”

The sheriff of Pierce county proceeded to, and did, sell the property, whereupon defendant objected to the confirmation of the sale.

The issue presented upon confirmation was whether a homestead can be claimed in unoccupied land by a mere declaration of intention. It has been held in *Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054; *Harding v. Atlantic Trust Co.*, 36 Wash. 536, 67 Pac. 222; *Lewis v. Mauerman*, 35 Wash. 156, 76 Pac. 737, and *Boothe v. Summit Coal Min. Co.*, 59 Wash. 610, 110 Pac. 536, that the confirmation of an execution sale of realty, after it has been claimed as exempt as the homestead of the judgment debtor, is not an adjudi-

cation upon the question of the homestead claim, nor does it conclude the right to question the sale upon collateral attack; for the reason that the only question that can be determined under the statute is the regularity of the proceedings leading up to and including the sale. Plaintiff accordingly asks for an order of dismissal and affirmation of the judgment of the lower court. On the other hand, defendant insists that we have held, in *Waldron v. Kineth*, 41 Wash. 459, 84 Pac. 16, 111 Am. St. 1022, that the right of homestead may be adjudicated upon confirmation, that an appeal may be taken from the order of confirmation, and that we will go beyond the regularity of the proceedings and inquire into the title to the property. We confess to some confusion in reconciling this case with our earlier decisions and the later case of *Boothe v. Summit Coal Min. Co.* The judgments being valid, it is not made clear why there should be an appeal in one case and not in the others; consequently we shall inquire briefly into the underlying principle governing cases of this kind.

There are very substantial reasons why the cases first referred to should be adhered to. The first and most important is, that the legislature, with seeming design, has said that the only objections to be considered upon the confirmation are such as go to the regularity of the proceeding. Rem. & Bal. Code, § 591. There can be no doubt of the construction put upon the statute in the *Krutz* case, for the court is directed to confirm the sale notwithstanding objections that do not go to the regularity of the proceeding; and further that, if the proceeding is irregular, the court is directed to disallow the motion and direct the property to be resold. The statute describes the duty of the court in the particular proceeding. Again, the inquiry upon confirmation is in a sense collateral, and may involve the rights of third parties who are not before the court. This being true, it has been held with one accord that the sale of a homestead passes neither title nor the right of possession (21 Cyc. 631);

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and this is the logic of our own cases when it is said that the homestead claimant is not concluded of his right by the order of confirmation. Neither has any procedure been devised by the legislature. A court is at a loss to know whether to proceed to hear the contention upon affidavits, or to frame an issue and take testimony on the law or equity side of the court. The futility of proceeding to the conclusion of either party, or going beyond the statute, is well illustrated by the record in this case. We have here only a claim of homestead in wild, unoccupied land. The claimant says he intends to make it his home. This may be true, but should he be permitted to conclude the right of his adversary upon such a showing? Must there not be some evidence to sustain the declaration; some showing of a movement toward the land claimed as a homestead? The court should not bind the parties upon such a record, since it may be that, by the time the question can be heard in a proper proceeding, the avowed intention may be abandoned, for unquestionably, if we are to sustain defendant's contention that the homestead may be eloigned by a declaration of intention, we should also hold that the land must be occupied within a reasonable time thereafter. To hold to the theories advanced by the defendant would be to declare a rule which would allow a stranger to the record to appear and resist confirmation, and upon hearing, to set up an independent title and demand a final adjudication. More might be said, but this is enough to excite an appreciation of the reason for the rule that hearings on confirmation are not for the purpose of trying title, but are limited to the objects covered by the statute.

The *Waldron* case seems to have proceeded upon the theory that the right to be heard could not be abridged as to either time or place. This is unsound, for remedies are wholly with the legislature, and in so far as the rights of defendant are concerned, they have not been denied. The *Waldron* case purports to be based upon *Field v. Greiner*, 11 Wash. 8, 39 Pac. 259, and *Whitworth v. McKee*, 32 Wash. 83, 72 Pac.

1046. In the *Field* case, the question before us was not argued in the briefs, nor does it seem to have been reflected on by the court. However, admitting that the question was decided and that the case is in point, it cannot stand as an authority in the light of the later cases. The *Whitworth* case was an independent action. The court held, and properly so, that, notwithstanding confirmation, the sale of a homestead was void. Our question was not involved or discussed. As said in the *Waldron* case, if the homestead is sold, it is a void sale; but it does not follow that the courts can resort to the general principles of equity, or try collateral questions of law, under a statute which says that, notwithstanding any objections, the court shall allow the order confirming the sale if the proceedings are regular—that is, in keeping and in line with the procedure in like cases. The confusion in our cases comes from a failure to differentiate between a judgment and sale. If the judgment is void, the court might, as suggested in *Krutz v. Batts*, refuse a confirmation. That is an irregularity in the proceeding; but the sale may be regular and subject to confirmation although eventually held to be void. This is the meaning of the *Boothe* case, wherein it is said that an order of confirmation can “be successfully resisted where it was made to appear that the order of sale on which it is based was void—this on the principle that a void order or judgment may be questioned at any time; but the cases first cited [being the *Krutz* and other cases], still stand as authority to the effect that a valid or voidable order of sale cannot be questioned on an appeal from the order of confirmation.” This is the final expression of this court and it unquestionably states the law. Mr. Freeman, in his valuable work on Executions, concludes as we do, saying:

“Whether the exemption of the property is a proper subject of consideration upon motion to confirm an execution sale is a question which has been but infrequently considered. If a sale may be refused confirmation on the ground that the

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property sold was exempt therefrom, the granting of an order of confirmation might involve an adjudication, actual or presumed, that the property sold was not exempt from such sale. We think the better opinion is, that the right of exemption, where claimed, should be left for determination in some subsequent action to recover the property sold, or to otherwise determine its title, and hence, that the confirmation of the sale of real property does not estop its owner from contending, in a subsequent action, that it constituted a homestead, and was, therefore, not subject to execution sale." Freeman, Executions (3d ed.), § 311.

The point is made that, there being no showing of an appraisement of the homestead, it is such an irregularity as will avoid the sale. The statute covering appraisement, Laws 1895, p. 109, § 9 *et seq.*, covers only those cases where an execution is levied upon an existing homestead the value of which may be contested by the execution creditor. Here there was no homestead asserted or in existence at the time of the levy, nor had the declaration of intention been filed. The execution was regular, and the land subject to levy. There was no irregularity. The object of the act of 1895 was not to try title, but to provide for a levy upon the excess value of property claimed as exempt, the exemption being admitted. This question may occur later, but it is not before us now.

For these reasons, the appeal is dismissed and the judgment of the lower court is affirmed.

MAIN, PARKER, MOUNT, and GOSE, JJ., concur.

[No. 10484. Department One. February 3, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. LOREN Z.
COOLIDGE, *Appellant*.¹

APPEAL—RIGHT TO APPEAL—WAIVER—CESSATION OF CONTROVERSY. The giving of a recognizance bond for the payment of the support of a minor child, upon a conviction of neglecting to support, is not such an acquiescence in the judgment as to operate as a cessation of the controversy or a waiver of the right of appeal.

CRIMINAL LAW—APPEAL—RECORD—BILL OF EXCEPTIONS—STATEMENT OF FACTS. A "bill of exceptions," upon appeal from a conviction of neglecting to support a minor child, is sufficient to raise questions that might have been presented by a "statement of facts."

PARENT AND CHILD—NONSUPPORT—CRIMINAL PROSECUTION. A conviction for neglecting to support a minor child is conclusive that the defendant had not complied with a decree of divorce requiring him to pay to his former wife monthly installments for the support of the child.

SAME—CRIMINAL AND CIVIL LIABILITY—CONFLICT—PROSECUTION AFTER DIVORCE. A conviction for neglecting to support a minor child cannot be had under the criminal statute, Rem. & Bal. Code, § 2444, in aid of a decree of divorce, where the custody of the child had been awarded to the mother, and the defendant was subject to the orders of the court in the civil proceeding requiring him to make monthly payments for such support, and the sentence and judgment in effect modified the decree of divorce without reference to it.

STATUTES—CONSTRUCTION. Penal statutes which are only *malum prohibitum* are to be strictly construed with reference to the liberty of the citizen.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 6, 1912, upon a trial and conviction of wilfully neglecting and refusing to provide for the support and maintenance of a minor child. Reversed.

O. M. Nelson, for appellant.

W. E. Campbell and A. Emerson Cross, for respondent.

¹Reported in 129 Pac. 1088.

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PER CURIAM.—Defendant was charged in the court below with wilfully neglecting and refusing to provide for the support and maintenance of his minor child, Ione Coolidge, she being in necessitous circumstances. The charge was under Rem. & Bal. Code, § 2444. Defendant was tried by a jury and convicted. No judgment seems to have been entered, but the court made an order fixing the amount to be paid each week, and staying proceedings pending the performance of a bond conditioned as follows:

“Now, therefore, it is hereby ordered and adjudged that said defendant Loren Z. Coolidge do forthwith enter into a recognizance in the sum of \$500, without surety, conditioned that the said defendant, Loren Coolidge, will faithfully pay weekly the sum of \$2.50, commencing with the coming week, payable not later than Saturday of each week to Blanche Coolidge for the benefit of said child, said payments to be made in said sum for the benefit of said child, until the further order of the court; and it is further ordered by the court that so long as the said defendant, Loren Coolidge, shall faithfully comply with the conditions of such recognizance, conditioned as herein provided, all proceedings herein shall be stayed until the further order of this court, but if said defendant, Loren Z. Coolidge, shall fail to comply with the conditions of such recognizance, or shall fail to comply with any order for his appearance in said court, such recognizance shall be forfeited and said proceedings in said cause shall be revived and continued, as if no stay had been had in said cause.”

A motion for new trial and a motion for judgment notwithstanding the verdict were overruled and severally excepted to. The bond was given and the state has interposed a motion to dismiss, upon the ground that the judgment has been performed, and that the giving of the bond operates as a cessation of the controversy and as a waiver of defendant's right to appeal. The motion will be overruled. It may be that a case might arise where the giving of a bond conditioned for the performance of a judgment would operate as a waiver of the right to appeal, but it cannot be so held in this case. The

verdict still stands, and defendant is entitled to urge such legal defense as he may have thereto.

It is also insisted that the court cannot consider the errors assigned, as there is no statement of fact, "only a bill of exceptions." The bill is sufficient to raise the question presented.

On November 20, 1911, a decree of divorce was entered in the superior court for Chehalis county, dissolving the bonds of matrimony theretofore existing between defendant and Blanche Coolidge. The custody of their minor child was awarded to the mother, and defendant was directed and required to pay to his former spouse the sum of \$20 per month for the support and maintenance of the child. That he did not perform the obligation put upon him is evidenced by this proceeding and the verdict of the jury. It is the contention of the defendant that, the child being awarded to the mother and he being subject to the further orders of the court in the divorce proceeding, no criminal charge will lie against him; that the statute, Rem. & Bal. Code, § 2444, was enacted to enforce the performance of a common law duty, and that, where the civil side of the court had assumed jurisdiction and fixed the duty of a delinquent parent by a charge in money, no common law duty remains; that his whole duty is merged in the decree of the court, with such modifications as may thereafter be made to meet new conditions. It is not denied that the court has ample power to enforce its decrees, but it is as earnestly urged that, notwithstanding that decree, an independent criminal proceeding can be maintained. An argument, specious but not sound, is made to sustain these contentions. It is unnecessary to follow it. It is met by the fact that the state introduced the divorce decree as the basis of its charge. Assuming that the custody of the child is given to a mother but no order for support is made, it would be manifestly unjust to charge a father under the criminal statute, when he might have no means of knowing of the necessities of his child or be unable to provide for it.

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Opinion Per Curiam.

The fallacy of the state's argument is further shown by the order made by the court. The trial judge evidently treated this case as a proceeding in aid of the divorce decree, for he has made an order which in effect modifies that decree, but without reference thereto. This it would seem he should not do, for defendant is now subject to two orders of the same court, one calling for the payment of a certain sum, and the other calling for a different sum. He is subject to a citation for contempt on the civil side, and to a judgment on the verdict and sentence on the criminal side. Surely it was never intended that the criminal statute should be put to such unfair uses, for the court rendering the divorce decree has ample power under the statute to enforce its orders; and if not directly declared, the policy of the law to keep the solution of such matters in the court having jurisdiction of all parties to the divorce proceeding is recognized, if not directly declared, in many decisions of this court. In *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13, we said:

"The practice of litigating questions of this kind by piecemeal cannot be too strongly condemned. Here the parties settled their property rights, and in all probability the issues in the divorce action, and a decree was entered making no provisions whatever for the support or maintenance of the minor child. Almost immediately the wife begins to assert claims against the husband which should have been determined and adjusted in the divorce action. Such a practice is neither in the interest of the parties nor in the interest of society at large."

Finally, counsel insist that the duty of the husband is not changed by the divorce, but that his obligation remains the same as before, citing: *Hector v. Hector*, *supra*; *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. 817. These authorities hold that, after separation or divorce, the common law obligation of the husband is not absolved, and the divorced wife can sue for contribution. But they do not hold, and we find no cases that do hold that, when the duty of the

father has been measured in money by a court of competent jurisdiction with power to enforce its decrees, an independent action can be maintained against him, or that appellant may be coerced by a criminal proceeding. The remedy lies in the court of first jurisdiction to which defendant is answerable, for by its order he has become primarily liable to the court rather than to his former spouse.

Penal statutes are to be strictly construed, to the end that no citizen shall be deprived of his liberty under statutes that are *malum prohibitum* only. The act declares that "every person who shall willfully and without lawful excuse desert, or willfully neglect or refuse to provide for the support and maintenance of his wife, or child under the age of sixteen years," etc., shall be punished. It then provides a procedure and punishment, indicating that the legislature had in mind only those cases where a husband deserts or refuses to provide for his wife or a child then in his custody and under his control; that it was not the intention of the legislature to cover by this law any case where the custody and control of the child had been taken away from the parent by the due processes of the law, or where the obligation of the husband to the wife or child had been defined and fixed with penalty by a court of competent jurisdiction.

The judgment is reversed, and the case remanded with instructions to enter a judgment in favor of the defendant notwithstanding the verdict.

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Opinion Per Gose, J.

[No. 10280. *En Banc*. February 7, 1913.]METROPOLITAN BUILDING COMPANY, *Respondent*, v. KING
COUNTY *et al.*, *Appellants*.¹

TAXATION—ASSESSMENT—VALUATION OF LEASEHOLD—EXCESSIVE ASSESSMENT. Where a leasehold interest in state lands is subject to a bonded indebtedness against improvements which revert to the state, so that it has no real market value, its valuation for the purposes of taxation must be measured by both its burdens and its benefits; and an assessment based on gross income or benefits alone is excessive.

Appeal from a judgment of the superior court for King county, Dykeman, J. entered January 11, 1912, reducing an assessment on a leasehold, upon review on certiorari of the proceedings of the board of equalization. Affirmed.

John F. Murphy and *Robert H. Evans*, for appellants.

Douglas, Lane & Douglas and *Kerr & McCord*, for respondent.

Gose, J.—This is an appeal from a judgment of the superior court of King county, modifying an assessment upon a leasehold interest in the old university grounds, in the city of Seattle. The case is not a stranger here. See: *Metropolitan Building Co. v. King County*, 62 Wash. 409, 118 Pac. 1114, Ann. Cas. 1912 C. 943; *Id.*, 64 Wash. 615, 117 Pac. 495. The law of the case was settled upon the first appeal. The second appeal presented substantially the same facts as this appeal. On the first appeal, the judgment reducing the assessment on the leasehold for the year 1909 from \$480,000 to \$96,000 was affirmed. In the second case, the trial court reduced the 1910 assessment from \$810,000 to \$225,000. On appeal this court reduced it to \$90,000. The assessor valued it at \$2,000,000 for the year 1911. This valuation, on the adopted basis of forty-five per cent, gave

¹Reported in 129 Pac. 883.

it an assessed valuation of \$900,000. Despite the protest of the respondent, the board of equalization confirmed the assessment. The case was taken to the superior court by certiorari, where the valuation was reduced to \$200,000 and the assessed valuation was placed at \$90,000. The county has appealed.

The lease was made for a term commencing February 1, 1907, and ending November 1, 1954. The rent reserved is \$15,000 per annum to November 1, 1912; \$40,000 per annum for the succeeding ten years; \$80,000 per annum for the next succeeding ten years; \$100,000 per annum for the next succeeding ten years; and \$140,000 per annum for the remainder of the term, all payable quarterly in advance. When the lease was made, the property was many feet above grade and unimproved. Up to March 1, 1911, the respondent had issued and sold its mortgage bonds to the amount of \$2,267,000. Of this sum it had expended \$2,060,000 in productive improvements and \$210,000 in nonproductive improvements, consisting of grading the property and the street paving, sidewalks, water mains, sewer and gas mains, light, heat, power, etc. In giving the figures we have used round numbers. Both the fee and the improvements belong to the state. The gross income from March 1, 1910, to March 1, 1911, was \$329,000. The gross expenses, not including taxes, during the same period was \$341,000.

The testimony shows that the leasehold, measured by its burdens and benefits, has no real market value, but that relieved of its burdens and measured only by its benefits it is of large value. Counsel for the appellant framed his hypothetical questions so as to ask the witnesses "to assume that there is no indebtedness against it," meaning the leasehold interest. The assumption belies the facts. As we have stated, the state owns both the fee and the improvements subject only to the right of user in the respondent. The leasehold is burdened by a debt exceeding the value placed upon the lease by most of the witnesses. A purchaser of the

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Opinion Per Gose, J.

lease would necessarily stand in the shoes of the respondent. He would take what it has with all its burdens, no more and no less. We had supposed that the former appeals fixed the standard of estimating the value. In the first appeal, we said that the value of the leasehold interest is its actual value in money on the date of the assessment, and

“The value of the term is fixed with reference to present as well as prospective conditions; not speculative, but actual; or, to state the proposition more aptly, its value in money to one who desires to sell but who is under no necessity of selling, and to one who is desirous of buying but is under no compulsion to do so.”

In the second appeal we said:

“While it is true that appellant has paid a considerable sum for the lease, has made valuable improvements, has issued bonds in the sum of \$1,844,000, and hopes to realize at some time in the future a profit on its investment, it indisputably appears that at the present time appellant is incurring a heavy loss which is constantly increasing, and that its entire enterprise may and probably will prove a financial failure unless growth of the city, improvement in the immediate locality, and material advancement in rental values cause the lease to appreciate in value. Should such an appreciation occur, an increased assessed valuation may be then legitimately imposed for the purposes of taxation.”

The last words quoted were prophetic. The situation has not changed. The law of common honesty applies to the taxing power with the same force it applies to an individual. To approve the equalized value would be virtual spoliation. We say here, as we have said before, that the value of the leasehold interest is to be measured both by its burdens and its benefits. It cannot be otherwise. A purchaser would necessarily take it *cum onere*.

The judgment is affirmed.

CROW, C. J., CHADWICK, MOUNT, PARKER, ELLIS, MORRIS, and MAIN, JJ., concur.

[No. 10836. Department One. February 8, 1913.]

NATHAN A. ARNOLD, *Respondent*, v. MINNIE M. HALL,
Appellant.¹

TRUSTS—EXPRESS TRUSTS—AGREEMENT TO RECONVEY—PAROL PROOF—ADMISSIBILITY. An express trust which cannot be proved by parol evidence, arises where a son, in order to appease his infirm mother, who believed his marriage changed the title from separate to community property, conveyed property to his mother by deed absolute in form, without consideration, under an agreement that she should immediately reconvey to him, there being no claim of fraud other than the failure of the trustee to perform the express contract; since no fraud inheres in the original transaction, and equity will not raise a constructive trust on mere breach of an express contract to convey.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered April 24, 1912, in favor of the plaintiff, after a trial on the merits before the court, in an action to declare a trust. Reversed.

Jas. J. Anderson, for appellant.

Thomas M. Vance, for respondent.

Gose, J.—On the 24th day of May, 1911, the plaintiff conveyed to his mother, Sarah E. Arnold, by a deed absolute in form, with covenants of warranty, a tract of land containing twenty acres, situate in Thurston county, in this state. On the 5th day of June following, Mrs. Arnold conveyed the property to the defendant, her daughter, by a deed of general warranty. Mrs. Arnold died on the 29th day of June following. On the day succeeding, this action was commenced, the plaintiff contending that he conveyed the property to his mother in trust, upon her promise to reconvey it to him. There was a decree for the plaintiff. The defendant has appealed.

¹Reported in 129 Pac. 914.

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Opinion Per GOSK, J.

There was nothing in the deed to show a trust, and there was no written declaration of a trust. It will be observed that the appellant and the respondent are sister and brother. The basis of the respondent's claim, as alleged in the complaint, is that he was the owner of the land when he made the conveyance to his mother, and had then owned it for about twelve years; that she was then "infirm in mind and body" and believed that his recent marriage had transformed the property from separate to community property; that by reason of her "said infirmity," she believed that he would be deprived of his right thereto as his separate estate, and that the transformation "might in the future work injury and damage" to him; that she believed that such result might be avoided by a conveyance of the property to her and the reconveyance by her to him, and "that yielding to the solicitations of his mother and to relieve her anxiety and uneasiness, plaintiff conveyed the said property as described, to her and had his wife join in said conveyance; that these were the sole considerations passing for the said conveyance, and that, at the time of its making, it was agreed and understood that his mother, Sarah E. Arnold, would promptly reconvey the said property to plaintiff." It is further alleged that the appellant had knowledge of these facts at the time of their occurrence. A general demurrer to the complaint was overruled. The testimony submitted by the respondent is to the effect that the mother promised to reconvey the property by "a gift or legacy." When the plaintiff rested, a demurrer to the evidence was likewise overruled.

The demurrer to the evidence should have been sustained. The trust alleged and proven was an express trust.

"Direct or express trusts are created by the direct or express words of a grantor or settlor." 1 Perry, Trusts and Trustees (6th ed.), § 73.

The distinction between express and implied trusts is pointed out by Beach on Trusts and Trustees, vol. 1, page 172, as follows:

"A fundamental distinction between express and implied trusts is, that the former, presumably, are created by the voluntary, or free and deliberate act of the parties, that they are in accordance with equity and that by the terms of their creation they are permanent in their operation; while in the latter, from the nature of the case, the element of permanency is absent, and that of rightfulness, so far as relates to the intention of the responsible party, and of freedom of action as well, may be altogether lacking. The essential idea of an implied trust involves a certain antagonism between the *cestui que trust* and the trustee, even where the trust has not arisen out of fraud, nor out of any transaction of a fraudulent or immoral character."

The case is controlled by: *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306; *Kinney v. McCall*, 57 Wash. 545, 107 Pac. 385; *Pilcher v. Lotzgesell*, 57 Wash. 471, 107 Pac. 340; *Holmes v. Holmes*, 65 Wash. 572, 118 Pac. 733, 68 L. R. A. (N. S.) 645; *Kalinowski v. McNeny*, 68 Wash. 681, 123 Pac. 1074. Our statute, Rem. & Bal. Code, § 8745, provides:

"All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate shall be by deed."

The cases cited settle the law in this state in this, that a resulting trust can, and that an express trust cannot, be proven by parol testimony, the latter being within the prohibition of the statute quoted. In *Spaulding v. Collins*, one of the grantors continued to reside upon the premises without paying rent, for more than twenty years after they had conveyed the property by a deed absolute in form, there being no written declaration of trust either in the deed or otherwise. More than twenty years after conveying the property, the grantors brought an action contending that the grantee was a trustee *ex maleficio*, or if not, that a resulting trust had been created. The facts relied upon to establish the trust, and the view of the court as to the nature of the trust

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Opinion Per GOSSE, J.

created, may be best stated in the language of the opinion. It says:

"We are satisfied from the evidence of Mr. J. M. Colman, who was the only witness who testified as to what the trust agreement really was, that the trust, if any, was an express trust, and not a trust *ex maleficio*, or resulting trust. This witness testified that Mrs. Spaulding wanted his son to take the deed, but that witness objected. 'So she spoke of Mr. Collins. I told her I would see him, and I saw Mr. Collins about it. . . . There was no talk about his buying the property. She did not talk about his buying the property. What she wanted was to have it deeded over to him until she could pay his debts. . . . She was afraid, she said, that her husband was running bills and they would be after her for the money and it might come against her property; that was the reason she wanted to get rid of it. She wanted it turned over to somebody that would protect her.' We think this evidence clearly shows an express trust which cannot be established by parol. *Holly Street Land Co. v. Beyer*, 48 Wash. 422, 93 Pac. 1065. . . . The rule is well settled under statutes like ours—Bal. Code, § 4517 (P. C. § 4435), providing that contracts creating incumbrances upon real estate shall be by deed—that it is only when fraud, actual or constructive, intervenes that equity will permit a trust agreement to be proved by parol."

In the course of the opinion, the court quoted with approval from *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509, as follows:

"The essential inquiry that arises upon this record is whether the trust sought to be proved and enforced is an express trust or an implied resulting trust. If express, there can be no resulting trust, and parol evidence is not admissible to prove that an absolute conveyance was made upon an express trust not declared in the writing itself. *Green v. Cates*, 73 Mo. 115; *Kingsbury v. Burnside*, 58 Ill. 310; *Stevenson v. Crapnell*, 114 Ill. 19. The character of the alleged trust in this case must be ascertained from the petition, and the evidence offered in support thereof. . . . the father conveyed said real estate by deed absolute to his son without qualification or limitation of any kind in the deed

and contemporaneously imposed upon the son the express parol trust to sell the lot as trustee for his father, pay off the liens, and refund the balance. If these averments and this testimony do not charge an attempt to establish an *express trust* of lands, then it would be difficult indeed to define an express trust within the meaning of the statute."

In conclusion, the court said:

"The trust, if any exists, is an express trust which cannot be proved by parol, and equity will not therefore interfere to change the contract from what it appears upon its face to be."

In *Kinney v. McCall*, it is said:

"The conveyance to Lide Gonder was absolute in form, and if there was a trust in favor of the grantors, or in favor of Mrs. Kinney, or in favor of Mrs. Kinney and the children, it was an express trust and could not be proven by parol. *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306. The wisdom of the rule excluding parol testimony in such cases was never better illustrated than in the case at bar."

In vol. 2 of Pomeroy's Equity Jurisprudence (2d ed.), § 1053, the following pertinent language occurs:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, *taking advantage of one's weakness or necessities*, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same; . . . and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust."

In saying that "it is only when fraud, actual or constructive, intervenes that equity will permit a trust agreement to be proved by parol," this court had reference to such fraud

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as inhered in the original transaction. Otherwise all trusts, whether express or implied, could be proven by parol, for in the larger sense the failure or refusal of the trustee of an express trust to execute the trust would be constructive fraud, and the statute would be rendered nugatory. In the instant case, there is no claim of fraud other than the failure of the trustee to perform her express contract.

The respondent relies upon *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270, and *Bluett v. Wilce*, 43 Wash. 492, 86 Pac. 858. In *Rozell v. Vansyckle*, a mentally weak, ignorant, old man, conveyed eighty acres of land without consideration to Vansyckle, upon whose counsel he unreservedly relied. Vansyckle assured him that he would hold the land in trust for him and reconvey it upon his request. The court said that the promise of the grantee was made in bad faith and with intent to deceive, and hence amounted to "an actual fraud." The court held in effect that the transaction created a trust *ex maleficio*. In *Bluett v. Wilce* the plaintiff sought to establish a trust *ex maleficio* in real property. The complaint alleged facts which if true would have established that the plaintiff had been induced to convey the property to the defendant by means of his fraudulent representations. The court said that the complaint disclosed a trust *ex maleficio*, but the evidence was not of that clear and convincing character required in such cases, and the plaintiff was denied relief.

The respondent argues that the transaction raised either a trust *ex maleficio* or a constructive trust. He pleaded an express contract to reconvey the property, and the evidence submitted is in harmony with the complaint. This would create an express trust. It is true that equity will raise a constructive trust to prevent a fraud, but where there is an express trust there can be, in the very nature of things, no implied or constructive trust. We need not consider the cases cited by the respondent from other jurisdictions, of which *Bowler v. Curler*, 21 Nev. 158, 26 Pac. 226, 37 Am.

St. 501, is a type. It holds that equity will raise a constructive trust when an express contract to reconvey the property has been breached. Such view is not only a virtual repeal of the statute of frauds, but is in clearest conflict with the decisions of this court to which reference has been made.

The judgment is reversed, with directions to enter a judgment for the appellant.

MAIN, MOUNT, CHADWICK, and PARKER, JJ., concur.

[No. 10188. Department Two. February 8, 1913.]

R. A. HUTCHINSON *et al.*, *Appellants*, v. THE CITY OF SPOKANE *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PROCEEDINGS—PETITION—ALTERATION—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show that a petition for a street improvement had been changed after it was signed, where the testimony to that effect of some of the signers was indistinct and uncertain, and was contradicted by the person who circulated the petition and inconsistent with the ordinances, specifications, contract and all the proceedings, and no objection was made until the contract was substantially completed.

SAME—PERFORMANCE OF CONTRACT—ACCEPTANCE—CONCLUSIVENESS. Where a contract for public work has been substantially complied with, the decision to that effect by the board of public works and city engineer, vested with power to determine all questions relating to the performance of the contract, is final and conclusive, in the absence of fraud.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 6, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to enjoin the collection of a special assessment for street improvements. Affirmed.

¹Reported in 129 Pac. 892.

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Opinion Per CROW, C. J.

Peacock & Ludden, for appellants.

A. M. Craven, W. E. Richardson, and Graves, Kizer & Graves, for respondents.

CROW, C. J.—This action was commenced by twenty-four property owners within an assessment district, to enjoin the city of Spokane from collecting a special assessment for the grading and paving of Arthur street and Newark avenue. The Spokane Asphalt Macadam Paving Company, a corporation, the contractor, with leave of court, intervened and joined in defending the action. From an order of dismissal, the plaintiffs have appealed.

The record shows that, with two exceptions, the owners of all property abutting on Arthur street and Newark avenue between Ivory and Third avenues petitioned for the improvement, using a printed form which reads as follows:

“The undersigned owners of property fronting upon Newark and Arthur between Ivory and Third Ave. . . . respectfully petition your honorable body to cause said streets to be improved within said limits at the expense of the owners of the property, in accordance with section 61, city charter, said improvements to consist of grading the same to the established grade, the full width thereof; and by building——sidewalks on both sides thereof, said grade to be as per diagram, to be made by the city engineer.”

At the time the petition was filed, a typewritten slip had been pasted over that portion of the above excerpt following the words “city charter,” causing the petition to read as follows:

“Respectfully petition your honorable body to cause said streets to be improved within said limits at the expense of the owners of the property in accordance with section 61, city charter; said improvements to consist of paving same with ‘Oileroid’ pavement on a macadam foundation, according to the specifications drawn and now on file in the office of the city engineer; cost of same not to exceed \$1.50 per square yard; curb to be made of cement.”

Appellants alleged, and asked the trial court to find, that after the petition had been signed, it had been changed by attaching the typewritten slip; that the change was made without their knowledge or consent; that it was acted upon by the city; and that an ordinance was passed authorizing an oileroid, or oil and rock pavement, and not an asphalt, macadam or other substantial pavement as originally understood and intended by the petitioners. Appellants contend that the alleged change in the petition was fraudulent, but do not specify the person by whom it was made. Some of the petitioners testified that the typewritten slip was not on the petition when they attached their signatures, but they were so indistinct and uncertain in their recollection of the contents of the petition which they claim they did sign that we conclude they must have been mistaken. The person who circulated the petition, a disinterested party, testified that no change had been made after any signature was obtained. There is no contention that the petition when filed with the city was not in its present condition. If the petition be considered with the slip removed, the only improvement thereby requested would be the grading of the street and the building of sidewalks, without indicating any character of sidewalks or calling for any street pavement whatever. It is conceded that the contemplated improvement was to be a street grade and pavement, and not any sidewalk construction. Our finding is that the petition was not changed after the signatures or any of them had been obtained. This finding is supported by the undisputed fact that the ordinance enacted by the council, the specifications prepared by the city engineer, and the contract with the intervener, all called for and contemplated an oileroid pavement, and by the further fact that no question as to the pavement intended was raised until the work was substantially completed, when some of the appellants interposed objections and complained that the street pavement as constructed would be valueless and of no benefit to the abutting property.

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Appellants contend that the improvement as constructed does not comply with specifications adopted by the city engineer, although the engineer has found that it does. They further contend that the pavement is worthless, unfit for travel, and a detriment to their property. After hearing the evidence the trial court found, that the contractor had exercised the utmost good faith and diligence in carrying out the specifications; that the city, through its proper authorities, exercised like good faith and diligence in seeing that the work was done according to the contract; that the work was performed in all substantial and essential respects according to the contract and specifications; that any immaterial deviations from the specifications that might have occurred were such as ordinarily occur in the doing of any work of like character, and had no detrimental effect upon the results obtained; that such defects as appeared in the completed work are inherent in the nature and plan of the improvement specified by the contract, and that they are such as would inevitably result from constructing the character of street improvement thereby proposed.

Without stating the conflicting evidence, which we have carefully examined, we conclude that it sustains the findings made. The situation seems to have been that the appellants petitioned for an oileroid macadam pavement of limited cost, and that they have obtained the pavement for which they petitioned. Evidence of expert engineers, who testified on behalf of appellants and also on behalf of respondents, was to the effect that such a pavement would necessarily be inferior in quality and usefulness to other well known street pavements such as asphalt or brick. When the pavement for which appellants petitioned was constructed, it did not meet their expectations, and being dissatisfied, they now seek to avoid payment of the assessment, although, as shown by the evidence, the contractor has done the work in substantial compliance with the contract and specifications. The power and authority to determine all questions relating to the per-

formance of the contract was by its terms vested in the board of public works and city engineer, and their decision as to whether the work was properly performed should be final and conclusive. It is a well established rule of law that, in the absence of fraud, the decision of officials having this power concludes all interested parties. 28 Cyc. 1137; 1 Elliott, Roads and Streets (3d ed.), 654; *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022; *Morehouse v. Clerk of Edmonds*, 70 Wash. 152, 126 Pac. 419; *State ex rel. Murphy v. Coleman*, 71 Wash. 15, 127 Pac. 568; *Chance v. Portland*, 26 Ore. 286, 38 Pac. 68.

In the case last cited, the supreme court of Oregon has stated the rule in language which we regard as especially pertinent to the instant case, and from which we will quote at considerable length. Speaking through Mr. Justice Wolverton, the Oregon court said:

“Here, then, is presented the question whether a street assessment can be declared null and void, and its collection perpetually enjoined, when it appears that the conditions and specifications of an ordinance providing for a street improvement for which the assessment was made have been substantially complied with by the contractor in making such improvement; that the officers and agents of the city acted honestly and in good faith in the supervision of the work, and that such improvement was completed to the satisfaction of the common council, and by said common council accepted in good faith. Undoubtedly, under such conditions, where there has been a substantial compliance with the ordinance which prescribes the mode in which the improvement shall be made, and the common council has honestly and in good faith accepted the improvement as satisfactory and completed in accordance with the ordinance, such acceptance is conclusive upon the abutting property owners: Cooley on Taxation (2d ed.), 671; Elliott on Roads and Streets, 416; *Town of Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *Motz v. City of Detroit*, 18 Mich. 515. Indeed, many authorities hold generally that when work has been accepted

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by the proper authorities of a city, and there is no allegation of fraud or collusion, such acceptance is conclusive evidence that the work was performed according to the requirements of the contract: See *Cooley on Taxation* (2d ed.), 671; *City of Henderson v. Lambert*, 14 Bush. 30; *Ricketts v. Village of Hyde Park*, 85 Ill. 113; *Emery v. Bradford*, 29 Cal. 83; *Joyes v. Shadburn*, 13 S. W. 361. But it is not necessary for us to go thus far in the present case. There was a substantial compliance with the ordinance, so that it cannot be alleged that fraud is even implied by reason of there being a wide difference between the work required by the ordinance and the work actually done. There is here no violation of the trust relations which exist between the officers of the municipality and the abutting property holders whose property is charged with the assessment. Neither fraud nor collusion is exhibited by the complaint on the part of the officers, and their authority throughout the whole proceedings, as shown by the testimony, appears to have been exercised within the limitation of their powers under the charter, and they have acted at all times in the utmost good faith. The acceptance of the improvement by the common council under these conditions is conclusive upon the defendants. It could not be promotive of good results to hold otherwise, as it would make the courts revisory bodies for every city government within the state, and open wide the doors for contests of this nature upon collateral proceedings like the present. By so doing the courts would usurp a large portion of the administrative powers of municipal governments. They have no such authority, and cannot interfere with the discretionary powers of such governments. These matters of discretion and authority must remain with the officers intrusted therewith under the law without molestation or interference by the courts. It follows that the defendants are entitled to a decree dismissing the complaint, and it is so ordered."

Appellants are disappointed in the street improvement, but from the evidence we conclude that they have obtained the identical improvement for which they petitioned; that the contractor has completed it in accordance with the specifications to the satisfaction of the city engineer; that no fraud

has been shown; and that appellants have no just cause of complaint.

The judgment is affirmed.

PARKER, ELLIS, and GOSE, JJ., concur.

[No. 10189. Department One. February 8, 1913.]

JOSEPH S. WHITE, *Plaintiff and Appellant*, v. DON A. STOUT
*et al., Defendants and Respondents.*¹

APPEAL—DECISIONS REVIEWABLE—COSTS—RETAXATION. An order refusing to retax costs is not appealable.

EMINENT DOMAIN—PROCEEDINGS — SEPARATE ACTIONS—NECESSITY. In an action to quiet title, to restrain a trespass, and to enjoin the use of irrigating ditches across the plaintiff's land, the defendant having the right to condemn a right of way for irrigation, may set up the same by way of defense to plaintiff's demand for an injunction, and have the damages ascertained without resorting to a separate condemnation proceeding.

SAME—PROCEEDINGS—DAMAGES—RIGHT TO JURY TRIAL — DEMAND. In such a case, plaintiff cannot allege error in that he was deprived of a jury trial to ascertain his damages for the condemnation, where he did not demand a jury trial, in view of his election to proceed in equity for an injunction instead of at law in ejectment.

SAME—PROCEEDINGS—DECREE—PAYMENT OF AWARD AND COSTS BEFORE TAKING. A suit for an injunction to prevent the use of irrigation ditches, in which the defendant set up as a defense his right to condemn, and plaintiff's damages therefor were awarded, with plaintiff's costs of suit, plaintiff cannot object that a decree enjoining the plaintiff from interfering with the ditches, upon defendant's paying the damages into court, authorized the taking without prior payment of the damages, including costs, in view of the rule that the compensation must be first paid into court and includes the costs, which defendant concedes must be paid prior to decree of appropriation.

Cross-appeals from a judgment of the superior court for Okanogan county, Neal, J., entered July 14, 1911, upon find-

¹Reported in 129 Pac. 917.

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ings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title and to enjoin a trespass. Affirmed.

Smith & Gresham, for appellant.

William C. Brown, for respondents.

MOUNT, J.—The plaintiff brought this action to quiet title and to restrain the defendants from trespassing upon certain lands owned by the plaintiff, and for damages because of alleged trespass. The defendants, in answer to the complaint, admitted ownership of the lands by the plaintiff, but denied all the other allegations relating to trespass and damage; then, by way of affirmative defense, alleged ownership of certain lands adjoining the plaintiff's; that these lands were irrigable lands situated on, and riparian to, Chiliwist creek, which flows across the same; that plaintiff's lands were above the defendants' lands, and that, in order to secure water from said creek, it was necessary to carry the same across defendants' lands; that while the title to the lands now owned by both plaintiff and defendants was in the United States, the plaintiff, in the year 1900, permitted the defendants to construct a ditch across his land and carry water therein to the defendants' lands; that plaintiff stood by and permitted defendants to spend a large amount of money constructing said ditch; that defendants have ever since used this ditch upon plaintiff's lands (this ditch is known in the record as "Ditch line B"); that in the year 1905, in consideration of certain improvements made by defendants upon plaintiff's lands, plaintiff permitted the defendants to construct another ditch across plaintiff's lands. This ditch is known as "Ditch line A." For a second affirmative defense and by way of cross-complaint, the defendants alleged necessity for the ditches for irrigation and for rights of way across plaintiff's lands, and asked the court to determine what damages the plaintiff should recover therefor.

The third affirmative defense was a claim of adverse user of said lands. The prayer of the answer was as follows:

“(1) That the plaintiff take nothing by this action.

“(2) That in case the court determines that the defendants have not a perfected right of way and easement for said ditches, or either of them, that the court then ascertain the amount of plaintiff's damages as and for a right of way for said ditches or either of them and decree upon the payment of said damages that defendants be and are the owners of said ditches and rights of way therefor, as the same are now laid out, or in case the court determines that the defendants are the owners of said ditches and rights of way therefor, but that the plaintiff is entitled to pay for the land used and occupied by the same, that the court proceed to ascertain the amount of such damages and give judgment for the same.

“(3) That the plaintiff be temporarily enjoined from interfering with said ditches and with defendants' use and enjoyment thereof until the final determination of this action.

“(4) That upon the final determination of this action the plaintiff be perpetually enjoined from interfering with said ditches and defendants' use and enjoyment thereof.”

The reply was, in substance, a general denial of the affirmative defenses. Upon the trial of the case without a jury, the court concluded that the prior use of plaintiff's land by defendants was a permissive use or license which could be revoked at any time, and which license had been revoked, but found the value of the land necessary to be taken for each ditch, and the damage to the remainder by reason of the taking. The decree provided for different amounts, depending upon the defendants constructing an open ditch or an underground pipe line. The decree recited:

“And it is further ordered and adjudged that unless defendants choose to so elect within thirty days after the date of the rendition of this decree and pay into this court for the plaintiff the sum or sums of money hereby awarded plaintiff as damages, that the defendants be enjoined from the use of said ditch lines, but upon an election being made under the terms of this decree by the defendants, and the money

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awarded as damages being paid into court for the plaintiff, then the plaintiff shall be perpetually enjoined from interfering with the defendants in maintaining, using and operating said ditches or either of them, and upon the acceptance of such damages by plaintiff for either or both of said ditch lines, then a supplemental decree shall be rendered and entered decreeing and adjudging the defendants to be the owners of such ditch line or ditch lines, and that the plaintiff be perpetually enjoined from interfering with defendants in using, maintaining and operating a ditch or canal along and across the course of either or both of said lines in accordance with the election made by the defendants, and upon the said damages being paid and an acceptance thereof consummated by plaintiff."

Within the thirty days, the defendants filed a declaration abandoning ditch line A, but accepting ditch line B, and paid into court \$239.75, being the value of the land taken as found by the court and the damages to the remainder of the land for ditch line B as an open ditch. Thereafter the plaintiff filed a cost bill amounting to \$694.25, which defendants moved to retax. The trial court struck out one item of \$10.60, but refused to further retax costs. The plaintiff has appealed from the decree upon the merits, while the defendants have appealed from the refusal to retax costs.

The defendants' appeal must be dismissed under the rule of *Smith v. Palmer*, 38 Wash. 276, 80 Pac. 460. The plaintiff contends that, because the trial court determined that the prior use of plaintiff's land for the two irrigation ditches was merely a permissive use, and because defendants had no other right to maintain ditches upon the plaintiff's land, therefore the court should have granted an injunction as prayed for in the complaint, but might have suspended this injunction order for a reasonable time to give the defendants an opportunity to condemn a right of way if they desire to do so across the plaintiff's land. In support of this position, the plaintiff relies upon the rule as stated in *Atkinson v. Washington Irr. Co.*, 44 Wash. 75, 86 Pac. 1123, 120 Am.

St. 978, and *Lund v. Idaho & Wash. N. R.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. 916. In those cases the injunctive order was made and stayed as requested by the plaintiff in this case, but in those cases there were no demands for condemnation in the answer as there was in this case. If the defendants in this case were wrongfully using the plaintiff's land and had no defense to injunctive relief, such relief would no doubt be granted; but where it appears by the answer, as it does in this case, that the defendants desired to acquire the right to remain in possession, or where it appears during the trial that the defendants may acquire that right, injunctive relief will not be given, provided the defendant seeks his remedy in condemnation. In the cases above cited and relied upon, the injunctive remedy was suspended in order to give the defendants an opportunity to exercise the right of eminent domain, which they were entitled to do. The bringing of an action to condemn within the fixed time suspended the injunctive order indefinitely, so that the remedy became of no effect when the judgment in condemnation was entered. In short, the condemnation of the plaintiff's land was a defense to the plaintiff's action to quiet title and to restrain the defendants from using the land. There can be no doubt of the defendants' right to condemn a right of way for irrigation over the plaintiff's lands. *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 Pac. 429, 140 Am. St. 898. It was proper, therefore, in this case to allege the right to condemn and have the damages fixed, as a defense to the plaintiff's demand for injunction.

The plaintiff argues that he was thereby deprived of the right to a jury trial. No jury was demanded in this case, and if one had been demanded, it was within the discretion of the trial court to grant such demand. The plaintiff selected his remedy by bringing his action in equity demanding equitable relief. Equitable rules therefore applied to the future procedure. The plaintiff might have brought a law action in ejectment and demanded a jury trial, but not hav-

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ing done so, he cannot be heard to complain that the action was tried according to rules of his own selection.

Plaintiff argues that the court erroneously authorized the defendants to take the land, by paying the value thereof together with the damages caused to the remainder of the land, without paying the costs of the action to condemn. The decree in this case cannot be construed as permitting the taking without the payment of costs, in view of the rule that compensation shall first be made and paid into court and that such compensation includes the costs in the superior court, as held in *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150, and cases there cited. The defendants concede that the costs must be paid prior to the decree of appropriation.

It is also argued that the decree is uncertain because it provides for relief in the alternative, and because the ditch line is not definitely located. There is no merit in either of these points. The decree is clear and definite. The line of the ditch in question is definitely fixed. It is already constructed, so that there can be no question as to its exact location. We find no error.

The judgment is therefore affirmed, without costs to either party in this court.

CROW, C. J., GOSE, CHADWICK, and PARKER, JJ., concur.

[No. 10592. Department One. February 8, 1913.]

GEORGE LUDWIGS, *Respondent*, v. J. L. DUMAS, *Appellant*.¹

MUNICIPAL CORPORATIONS — STREETS — USE — COLLISION BETWEEN AUTOMOBILE AND BICYCLE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the driver of an automobile, and the contributory negligence of plaintiff riding a bicycle, are questions for the jury, where the plaintiff was on a crossing ordinarily used by pedestrians, going in an opposite direction from which he had come a moment before, in plain view and crossing the course of the automobile which was very near and making no noise, and exceeding the city speed limit, so that neither party saw the other in time to avoid the accident.

SAME—AUTOMOBILES — VIOLATION OF SPEED LIMIT — ORDINANCE—CONSTRUCTION. A person riding a bicycle on a city street crossing is within the protection of a city ordinance fixing the speed limit for automobiles at four miles an hour over city crossings "when any person is upon the same."

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 10, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a collision with an automobile. Affirmed.

Sharpstein & Sharpstein, for appellant.

T. P. & C. C. Gose, for respondent.

MOUNT, J.—The plaintiff brought this action to recover damages on account of personal injuries sustained by reason of having been run over by defendant's automobile. The complaint alleged that the defendant was running his automobile upon a street in the city of Walla Walla at a greater rate of speed than ten miles per hour, and that, while he was so running his automobile, he so carelessly and negligently operated the same that it struck the plaintiff with great force, knocked him down, and ran over him, etc. The defendant denied these allegations, and pleaded contributory

¹Reported in 129 Pac. 903.

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negligence of plaintiff. A jury trial resulted in a verdict and judgment in favor of the plaintiff for \$1,250. The defendant has appealed.

He insists, (1) that the court erred in refusing to direct a verdict in favor of the defendant at the close of all of the evidence, and (2) in giving to the jury the following instruction:

"I instruct you that it is unlawful for any person to drive or operate an automobile in the city of Walla Walla over any crossing or crosswalk at a rate of speed faster than one mile in fifteen minutes; that is, at a rate of speed faster than four miles per hour when any person is upon the same."

The facts in the case show that, on the 8th day of July, 1911, the defendant was driving a new automobile south along Second street in the city of Walla Walla. This street was a paved street, running nearly north and south. The evidence is not clear whether he was driving upon the right or left side of the street; plaintiff's witnesses say that he was upon the left, while the defendant's witnesses say he was upon the right side of the street. He was driving at about ten miles per hour. He intended to turn into Newell street to his left. This street was an unimproved street; that is, it was not paved, but was commonly used by pedestrians upon the sidewalk on each side of the street, and by vehicles upon a well-beaten roadway about the center of the street. This street intersected Second avenue at right angles, running east and west. It was about forty-eight feet wide between the curbs of the pavement on Second street. The pavement upon Second street extended into Newell street to the property lines on each side of Second street, so that the pavement upon the entrance to Newell street from Second street was the same width of the parking strip and sidewalk on Second street.

When the defendant was driving in his automobile south along Second street toward Newell street, he saw the plaintiff riding a bicycle, also south about the middle of Second

street. Plaintiff was one hundred or one hundred and fifty feet ahead of the defendant, both going in the same direction and both going at about the same rate of speed. When the plaintiff came to Newell street, he at first intended to turn to his left along that street and ride his bicycle upon a path or sidewalk and go east upon the south side of that street; but he saw some persons upon the path or walk, and for that reason concluded to go upon the bicycle path along the north side of Newell street. At that time he had passed the north line of Newell street upon Second street, and was about the center of that street, so that, in going to the north side, his bicycle described a semicircle, which brought him out of the line of Second street and upon the pavement between the curbs upon Newell street, going northerly upon the pavement where pedestrians crossed Newell street upon Second street. At this time plaintiff says he glanced up Second street and saw no one approaching. There was no one except plaintiff upon the crossing at that time. The defendant, with his automobile, in the meantime came down Second street and turned into Newell street. Neither party saw the other until it was too late to stop or avoid a collision. Defendant swerved his machine to the left, but the right front wheel of the automobile struck the plaintiff's bicycle about the front wheel, threw the plaintiff to the ground, and ran over and injured him. Before the defendant turned into Newell street, he shut off the power of his machine and slowed down some. The lot upon the corner where the accident happened was an unimproved lot, and the automobile was making no noise and sounded no alarm. The accident happened in the daytime.

The appellant contends that this case falls within the principle, and is controlled by, the following cases: *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983; *Fluhart v. Seattle, Elec. Co.*, 65 Wash. 291, 118 Pac. 51; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, and therefore that the trial court should have directed a verdict for the defend-

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ant. We think this case is not controlled by those cases, because there the party injured went into the course of the approaching vehicle or car when he should have known that the vehicle was coming and could not be stopped in time to prevent an injury. In this case the plaintiff testified that he looked up the street in the direction from which he came and saw no vehicle. At that time the plaintiff's automobile must have been very near, probably to his left on the opposite side of the street. It was making no noise. The plaintiff was upon the crossing ordinarily used by pedestrians, going in an opposite direction from which he had come the moment before. He was in plain view of the defendant, and apparently crossing the course which defendant desired to take at that time. Whether he should have seen the defendant and avoided the automobile, or whether the defendant should have seen the plaintiff and avoided him, were, we think, questions for the jury. In the case of *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892, where we were considering the question of failure of the injured party to look for the automobile which struck him and where the trial court had granted defendant's motion for a nonsuit, we said:

"Even granting that the appellant was negligent in failing to look to the south after leaving the curb, that fact cannot be held, as a matter of law, the proximate or efficient cause of the injury. The respondent had no absolute right of way along the street. His right was certainly no greater than that of the appellant. Their rights and duties were reciprocal. Whether, notwithstanding any previous negligence of the appellant, the respondent could have seen the appellant and avoided the accident had he been running at a reasonable rate of speed, or had he sounded a horn, was a question for the jury."

In that case the parties were the reverse of this, but the facts upon this point are very similar, and we held that the case should have gone to the jury. We think the rule in that case controls this, and the court therefore did not err in submitting the question of negligence to the jury.

Appellant argues that the court erred in giving the instruction above quoted, because it is not applicable to the facts in this case. The instruction is substantially in the language of the ordinance of the city of Walla Walla. The appellant contends that the accident did not happen on the crossing or crosswalk, and that the phrase "when any person is upon the same," means when any person is using or crossing as a pedestrian, and does not apply to persons riding a vehicle over or across the same. The ordinance is general. It was intended to prevent automobiles from running in excess of four miles per hour over street crossings while other persons were upon such crossings. We think the evidence showed quite clearly that the plaintiff was upon the crossing. He may have been slightly off the line of the usual travel, but he was crossing the street at the crossing as he had a right to do. The fact that he was riding a bicycle, or was standing, or was in some other vehicle either standing or moving, would make no difference. He was upon or so near the crossing that he must be regarded as upon it, and it was therefore the duty of the driver of the automobile to slow down to the required speed, or at least to prevent his machine from running down some person who was there ahead of him, or who was likely to be endangered by the automobile. We think the instruction is applicable to the facts in the case. It was therefore not erroneous.

The judgment is affirmed.

CROW, C. J., PARKER, and FULLERTON, JJ., concur.

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[No. 10321. Department One. February 8, 1913.]

CITIZENS NATIONAL BANK OF SEATTLE, *Appellant*, v. E. A. ABBOTT, *Trustee in Bankruptcy, Respondent*.¹

MORTGAGES—FORECLOSURE—VENUE — SEPARATE MORTGAGES — ELECTION—WAIVER. Separate mortgages given upon land in separate counties, each securing a specific portion of one promissory note, are not given to secure the same debt, for the purposes of foreclosure, where a personal judgment is not sought, since the separation for the purposes of foreclosure makes each a separate debt and foreclosure thereof local to the county in which the land is situated; hence a foreclosure of one mortgage in one county does not waive the right to foreclose the other in a separate action.

SAME—FORECLOSURE OF SEPARATE MORTGAGES—COMPLAINT—PRAYER FOR PERSONAL JUDGMENT—ABANDONMENT—EFFECT. In such case, a prayer for personal judgment in the first action does not waive the right to foreclose the other mortgage, where such prayer was abandoned with a view of prosecuting the second suit, and no personal judgment was entered.

SAME—DECREE—RES JUDICATA. A personal judgment on a note secured by mortgage, is not *res judicata* or a bar to a subsequent action to foreclose the lien of the mortgage.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered April 1, 1912, in favor of the defendant upon the pleadings, in an action to foreclose a mortgage. Reversed.

S. A. Keenan and *John Truax*, for appellant.

Leopold M. Stern, *Edgar C. Synder*, and *Adams & Naef* (*J. W. Russell*, of counsel), for respondent.

PARKER, J.—This is an action to foreclose a mortgage upon land in Adams county, which, with another mortgage upon land in King county, was executed by Wigmore & Cummings, a corporation, to secure an indebtedness of \$10,800, evidenced by one promissory note given by it to the Citizens National Bank of Seattle. Wigmore & Cum-

¹Reported in 129 Pac. 1085.

tings having been adjudged bankrupt, the controversy here is between the bank and E. A. Abbott, the trustee in bankruptcy. Judgment was rendered in favor of the trustee, denying the foreclosure prayed for, upon his motion therefor rested upon the facts disclosed by the pleadings alone. From this disposition of the cause, the bank has appealed.

The facts appearing in the pleadings, necessary for us to notice here, consisting of the complaint, answer, and reply, may be summarized as follows: The complaint alleges the indebtedness, the execution of the note as evidence thereof, and also:

“That at the same time and place and for the purpose of further securing said indebtedness, said defendant Wigmore & Cummings duly executed to said H. O. Shuey & Co., in trust for plaintiff, a mortgage upon the following described real estate situate and being in the county of Adams and state of Washington to wit: . . . Among other things in said mortgage is was provided that if the first party should pay or cause to be paid the sum of fifty-four hundred dollars (\$5,400) on said promissory note at the maturity thereof, then, and in that event, said mortgage or conveyance should be void, otherwise to remain in full force and effect; and also provided that in case of failure to keep any of the covenants in said mortgage or to pay the interest on said note or to pay the said amount of fifty-four hundred dollars (\$5,400) on or before April 23rd, 1911, then the whole debt, at the election of said mortgagee, might declare the whole debt due and payable and proceed with the foreclosure of said mortgage as provided by statute; . . . That there is now due and payable on said indebtedness the sum of ten thousand eight hundred (\$10,800) dollars, together with interest thereon from January 23rd, 1911, at the rate of eight (8%) per cent per annum, and there is now due and payable of said debt and which is secured by said mortgage the sum of five thousand four hundred (\$5,400) dollars and interest at eight per cent (8%) per annum, payable annually, since January 23rd, 1911.”

The prayer is for foreclosure only, there being no personal judgment asked for. The answer of the trustee, after

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denial of his knowledge or information as to the principal allegations of the complaint, alleges, as an affirmative defense, facts showing a prior foreclosure by the bank of the mortgage upon land in King county, and the failure on the part of the bank to seek foreclosure of the mortgage upon the land in Adams county in that action, alleging briefly the substance of the complaint and decree in that foreclosure without setting out any copy of either. Replying to this affirmative defense, the bank admits foreclosure by it of the mortgage upon the King county land, setting out in full a copy of both the complaint and decree in that foreclosure. The portions of that complaint with which we are here concerned are, in substance, the same as the complaint in this action, and the provisions of that mortgage are, in substance, the same as the one here sought to be foreclosed, except as to the property covered thereby. There was, however, in that complaint a prayer for personal judgment against Wigmore & Cummings for the whole indebtedness evidenced by the note, in addition to the prayer for foreclosure. The decree in that foreclosure contained, among other things, the following:

“By the terms of which mortgage it was intended to and did secure five thousand four hundred dollars (\$5,400) of said principal indebtedness hereinbefore specified; . . . The court finds from said instrument, from the testimony of A. J. C. Wigmore, president of said defendant corporation, and from other evidence that there is now due and payable on said principal indebtedness the sum of ten thousand four hundred eighty-six dollars (\$10,486); that the sum of five thousand two hundred forty-three dollars (\$5,243) thereof is secured by said mortgage on the property hereinbefore described. And the court further finds that the balance thereof or five thousand two hundred forty-three dollars (\$5,243) is secured by another mortgage executed by said defendant corporation at the same time to said H. O. Shuey & Co., as trustee for said bank on 480 acres of land in Adams county in said state. . . . Wherefore, by virtue of the laws and the premises aforesaid, it is ordered, adjudged and

decreed that plaintiff bank have and recover of said defendant corporation by reason of the said indebtedness secured by said mortgage, the sum of five thousand two hundred forty-three dollars (\$5,243). . . . It is hereby adjudged and decreed that all and singular the mortgaged premises first above described and situate in the city of Seattle, together with the factory and other improvements thereon, or so much thereof as may be necessary to satisfy the said indebtedness of five thousand two hundred forty-three dollars (\$5,243). . . . That out of the proceeds of said sale, the sheriff satisfy the costs and expenses of this suit and apply the balance in payment of said indebtedness to this plaintiff, and the remainder, if any, to be paid to the receiver [trustee] of said defendant heretofore duly appointed."

There does not appear in this record any copy of either of the mortgages, so the question of their relation to each other and of the separateness of the debt or portions of debt they were given to secure, must here be determined from the pleaded facts we have briefly narrated.

Counsel for respondent rest their contentions upon the theory that the mortgages were given to secure the same debt, and therefore constitute in law but one mortgage, although covering land in different counties, and plaintiff, having the right to foreclose as to both pieces of property in the King county action, waived its lien upon the Adams county property by its failure to include it in the King county foreclosure. This, apparently, was also the theory upon which the trial court rested its disposition of the cause.

Our attention is called to *Commercial Nat. Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267, where it was held that two mortgages, one upon land in King county and the other upon land in Kittitas county, given to secure the same debt, should be regarded as one instrument, and that the superior court of either county had jurisdiction to foreclose both of them; and also, to *Dooly v. Eastman*, 28 Wash. 564, 68 Pac. 1039, where it was held that the owner of a mortgage upon two distinct tracts of land, foreclosing against one of them only, waived his right to enforce the mortgage lien against

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the other tract. In both of those cases each tract of land involved was pledged as security for the whole of the same debt. This, it may be insisted, is not wholly true in the *Commercial National Bank* case, but it is apparently true in so far as the debt involved in that case is concerned. The other debt which one of the mortgages was given to secure, in addition to the debt involved, seems not to have been involved in that case.

While it is conceded by counsel for respondent that under our law a suit to foreclose a mortgage upon land is local to the county wherein the land lies, they contend that the foreclosure of the mortgages here involved, by reason of their relation to each other, constitute an exception to this rule under the decisions above noticed. The solution of this problem will be found in the correct answer to the question, Were these mortgages given to secure the same debt? since it is manifest that they have no relation to each other except such as may be found in the debt or portions of debt each was given to secure. Looking only to the first part of the allegation of the complaint above quoted, which we have noticed was the same in the King county foreclosure, there appears to be ground for the contention that the mortgages were both given to secure all of the indebtedness evidenced by the one note. But when we look to the special conditions in the mortgages as stated in the complaints, we find that they were each given to secure separately the sum of \$5,400, or one-half of the whole debt evidenced by the one note. That the trial court, upon the foreclosure of the mortgage on the King county land, entertained this view, and in effect so adjudicated, is plainly evidenced by the recitals and adjudications in its decree rendered in that foreclosure. While it is true that, for the purpose of an action to recover a personal judgment only, the debt must be regarded as a whole and can be the subject of one action only, we do not think it follows that separate mortgages given upon land in separate counties, each securing a specific separate portion of a debt, can be

said to be mortgages securing the same debt, for the purpose of foreclosure. The separation of the debt for the purpose of security in this manner, we think renders each portion thereof, so far as the security alone is concerned, a separate debt, and the mortgages having no other relation to each other, their foreclosure would be local to the county wherein the land lies; hence the bank did not, by foreclosing the King county mortgage, waive its right to foreclose the Adams county mortgage.

Some contention is made rested upon the fact that, in the foreclosure of the mortgage upon the King county land, the bank prayed for a personal deficiency judgment. It is manifest, however, from the recitals and adjudications in that decree, that the personal character of the action and the relief there sought was abandoned by the bank with a view to looking to the security furnished by the Adams county mortgage for the other half of the debt. In that case the court did not adjudicate that there was then only \$5,248 of the debt owing by Wigmore & Cummings, but expressly found that the whole debt was due and unpaid. No judgment was there rendered upon the whole debt, but only a decree of foreclosure to the extent of the half thereof secured by the King county mortgage. It seems plain to us that that decree was not an adjudication against the bank as to the portion of the debt secured by the Adams county mortgage. But suppose there had been rendered in that case a personal judgment for the half of the debt not secured by the King county mortgage. We would then have a situation not unlike that occurring in *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271, where it was held that the fact that a personal judgment on notes secured by a mortgage had been rendered would not constitute such judgment *res judicata* in a subsequent action for the foreclosure of the mortgage lien, for the purpose of recovering that portion of the debt which remained unpaid under such a personal judgment.

We are constrained to hold that the judgment of the trial court must be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed. It is so ordered.

Crow, C. J., Gose, Chadwick, and Mount, JJ., concur.

[No. 10649. Department One. February 8, 1913].

SCANDINAVIAN AMERICAN STATE BANK, *Respondent*, v. JOHN M. DOWNS *et al.*, *Appellants*.¹

MORTGAGES—ABSOLUTE DEED AS MORTGAGE—TRUST—EVIDENCE—SUFFICIENCY. A deed absolute in form is properly held to have been given as security for a debt, and not in trust for the grantor, where it appears to have been given pursuant to a demand for additional security, the grantor signed a statement so reciting, and his evidence in support of an alleged trust showed an intent on his part to defraud creditors, which was not communicated by the agent to the grantee.

NEW TRIAL—GROUNDS—SURPRISE. Failure to call a certain witness does not entitle the adversary to a new trial on the ground of surprise.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 27, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury. Affirmed.

D. R. Glasgow, for appellants.

Chas. N. Madeen and *Samuel R. Stern*, for respondent.

PARKER, J.—The plaintiff seeks foreclosure of liens claimed by it upon three different parcels of real property in Spokane county, which it alleges are evidenced by three warranty deeds, absolute in form, but which are in fact mortgages given by the defendants to the plaintiffs to secure an indebtedness of \$7,500. Judgment was rendered in favor of the plaintiff, foreclosing all of the liens so evidenced. The defendants have

¹Reported in 129 Pac. 894.

appealed from so much of the judgment as decrees foreclosure against the real property conveyed by one of the deeds, contending that that deed was not given as security for the indebtedness as the other deeds were, but for the purpose of having respondent hold the property conveyed thereby in trust for appellants.

Appellants are residents of Spokane, in this state. Respondent is a banking corporation of Montana, with its principal place of business in Missoula, in that state. In January, 1911, appellants executed and delivered to respondent their promissory note for \$7,500, to evidence an indebtedness then owing by them to it. About the same time, to secure this indebtedness, they executed and delivered to respondent two deeds of certain real property owned by them in Spokane county. This was done in pursuance of negotiations leading up to the incurring of the indebtedness. Soon thereafter appellants executed and caused to be delivered to the respondent another deed for lot 11, block 30, Heath's Fifth addition to Spokane, being the deed and property involved in this appeal. At the same time, appellant John M. Downs signed and caused to be delivered to respondent with this deed a writing, reading as follows:

"For and in consideration of a loan of seventy-five hundred (\$7,500) dollars, which the Scandinavian American State Bank made to the undersigned John M. Downs, on the 18th day of January, 1911, I, the undersigned, John M. Downs, hereby assign, sell, transfer and set over to the said Scandinavian American State Bank at Missoula, Montana, all my right, title and interest in and to lot eleven (11), block thirty (30), Heath's Fifth addition, to the city of Spokane Falls, now Spokane, Washington, as per deed handed you herewith today.
(Signed) John M. Downs."

So far the facts are undisputed. The controlling question presented is, Was the deed here involved given by appellants as additional security for the indebtedness, or merely for the purpose of vesting title in respondent, to be held by it in trust for appellants? Aside from the above quoted writing

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signed by appellant John M. Downs, showing the evident purpose of the giving of this deed, the testimony is in serious conflict as to the purpose of appellants, especially in so far as respondent may be bound by any such purpose on their part. We think, however, that the learned trial court was warranted in believing the following facts established by the evidence: When the first deed was given as security for the indebtedness, respondent was led to believe that the property conveyed thereby was free from incumbrance. Soon thereafter it discovered that the property was incumbered, and it thereupon demanded additional security. In response to this demand, it received this deed and the signed statement of appellant John M. Downs accompanying it. This deed and statement were not delivered directly by appellants or either of them, but were delivered by a Mr. White, their agent, to whom they had sent the deed and statement to be delivered to respondent. This is, in substance, all of the information respondent or its officers had touching the intent and purpose of appellants in the execution and delivery to it of the deed in question.

Appellant John M. Downs testified, in substance, that another of his creditors was pressing him for payment at the time of, and shortly before, the execution of this deed, and that, in order to be able to give a plausible excuse for not subjecting this property to the satisfaction of his debts, he conceived the idea of placing this deed in the hands of respondent, not as additional security, but in trust only, with a view to having it returned upon settlement with the creditor then pressing him, and that White was so instructed as agent of appellants. In view of this stated purpose of Downs to thus hinder, if not actually defraud, his creditor in this manner, the trial court was evidently not impressed with his version of the purpose for which the deed was executed, and concluded that it was in fact executed by appellants and received by respondent as additional security. We are constrained to fully agree with the trial court in so concluding.

One of the grounds of appellants' motion for a new trial was surprise, which they contend consisted of the fact that, upon the trial of the case, respondent did not produce White as a witness. It is not contended that there was any promise or inducement held out to appellants which would lead them to believe that White would be produced as a witness, other than the mere fact that it was evident that the testimony of White might have a material bearing upon the question of his power as agent in delivering the deed to respondent. This contention is answered by the general rule that "the fact that the adversary's evidence is different from what it was supposed it would be is not sufficient," to show surprise calling for a new trial. 14 Ency. Plead. & Prac., 734.

The decision of this court in *Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832, is in harmony with this view.

The judgment is affirmed.

CROW, C. J., GOSE, MOUNT, and CHADWICK, JJ., concur.

[No. 10633. Department Two. February 8, 1913.]

STEWART M. WILE, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

CARRIERS—INJURIES TO PASSENGERS—SUDDEN JERKS AND JARS. Evidence that a passenger on a mixed freight train was thrown to the floor by a sudden jolt is insufficient to sustain a recovery for the injuries sustained in the fall, where there was no evidence that there was anything unusual or more than the ordinary jerking or jolting necessarily incident to the operation of freight trains; since negligence cannot be inferred therefrom.

SAME—PRESUMPTIONS. The rule of *res ipsa loquitur* has no application to a case in which a passenger on a freight train was thrown to the floor by a sudden jolt in the operation of the train.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered March 25, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an

¹Reported in 129 Pac. 889.

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Opinion Per MORRIS, J.

action for personal injuries sustained by a passenger on a railway train. Reversed.

C. H. Winders, for appellant.

Neterer & Pemberton, for respondent.

MORRIS, J.—Damages are asked for in this case, based upon the claim of respondent that he was injured by being thrown against the corner of a seat while a passenger upon one of appellant's mixed trains. The allegation of negligence is, that "defendant so negligently and carelessly operated the engine detached from the said car, by backing and bumping same against the car on which plaintiff was riding while said car was standing still, with great force and such force as to move the car with such suddenness and force as to throw the plaintiff down." The claim of error is that the evidence is insufficient to sustain this allegation, and that appellant's motion for judgment notwithstanding the verdict should have been granted.

The train upon which respondent took passage was composed of thirty freight cars and a passenger car. Respondent was lame and walked with a limp, one of his legs being shorter than the other. He generally carried a cane or stick to assist him in walking. When the train arrived at Wheeler, and after it had been standing some time, respondent arose from his seat and started to walk to the other end of the car to obtain a drink of water. He did not take his stick with him, but left it in his seat. He had taken only a few steps when, he says, "there came in from in front a bump which took me about three or four feet off my feet, and then I went to catch myself and I fell over." He says again, in response to a question as to the force of the jolt: "Well, there was force enough to take me about four feet and then the length of myself." There is no other testimony in the record as to the jerk or jolt to which respondent attributes his fall. He says that the car in which he was riding frequently received the same kind of a jolt or jar both before and after the one which

caused his fall. There was no testimony showing other facts incident to the occurrence, such as any unusual disturbance, nor did respondent attempt to show that the jolt or jar was greater than is ordinarily incident to the operation of freight trains with passenger accommodations attached.

The law, as established by a long list of authorities in cases of this character, will not support a recovery until there is some evidence to justify a finding by the jury that the thing complained of was something more than the ordinary jerking or jolt necessarily incident to the operation of freight trains, or results from defects in equipment or roadbed, negligence of train operations, or other causes leading to a belief that it was an unusual happening and one which could not be said to be the ordinary and usual disturbance caused by the handling of freight and the backing and filling incident to the work performed by trains of such a character.

"It is a matter of common knowledge that jolts and jerks are usual incidents in the operation of freight trains and therefore negligence cannot be inferred from the mere fact that a passenger's injury resulted from a jar, caused by the sudden stopping of such a train. In other words, a jar, or jerk, in a freight train, is not of itself evidence of negligence." 2 White, Personal Injuries on Railroads, § 670.

In the preceding section 669, the same author says—

"A railroad company, undertaking to carry passengers for hire, upon freight trains, owes them the same duty, as to care, which the law exacts of it as to passengers transported on passenger trains, the only difference being that the passengers on freight trains assume those dangers or perils which are necessarily incident to that mode of conveyance. . . . A passenger on a freight train is charged with knowledge of and assumes the increased hazards, incident to that mode of travel, and he accepts passage with notice that the train is not equipped with all the safeguards provided for passenger trains and the risk of injury due to this fact."

Elliott on Railroads states the same rule in vol. 4, § 1629, and says:

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"The duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated, . . . nor is the company necessarily negligent, because in starting or in taking up or letting out slack there is more or less of a jerk or sudden motion of the cars."

Thompson, in vol. 3, § 2903, of his Commentaries on the Law of Negligence, announces the same rule. A late case, reviewing many of the authorities in cases of this character, is *St. Louis & S. F. R. Co. v. Gosnell*, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892, where, after stating the rule as derived from the many authorities reviewed, in a case where the injured person, while standing with his hands against the casings of the rear door of the caboose attached to a freight train upon which he had taken passage, was thrown down and injured by the sudden stopping of the train, with a jar such as to cause him to leave his feet, it was held there could be no recovery. There was in that case, as in this, nothing to show that the jolt or jerk was anything more than was to be anticipated in a train of this character. It is there pointed out as well established that, before a recovery can be sustained in these cases, there must be some evidence to justify the conclusion that the jolt or jar was of such unusual severity that it was not attributable to the jerking and jolting incident to the operation of freight trains. There are many cases in which recovery has been sustained for injuries resulting from jerks, jars and jolts on freight or mixed trains, but in all of these cases there was evidence that the cause of the injury was other than a necessary incident to the careful operation of such trains, and the facts and circumstances surrounding the injury were such as to speak negligence.

The rule for which we contend does not lessen the degree of care demanded by the law to the passenger on a railway train. It is the same, whatever be the character of the train upon which he rides. The life and safety of the passenger on the freight train is as valuable to him as that of his more

fortunate brother who rides upon the most elaborate train *de luxe*. The duty in each case is the highest degree of care consistent with good railroading. The law cannot, however, blind itself to the common facts of every-day experience, and it takes knowledge of the fact that, with the highest care known to modern railroading, the best built Pullman or drawing room car will lurch and sway, bringing a risk of injury to the passenger which he assumes, because scientific railroading knows no way to avoid it. *Valentine v. Northern Pac. R. Co.*, 70 Wash. 95, 126 Pac. 99. So, for the same reason, the passenger on the freight must assume the risk of injury from causes that are incident to the operation of such trains, and when he pleads an injury as the result of negligence in the operation of such a train, he must prove it by going farther than saying, while he was walking or standing in the car, a sudden jerk or jolt threw him to the floor. Because of his crippled condition, respondent usually carried a stick to aid him in walking. When he arose to walk to the water tank, he left his stick in his seat. It is, we think, evident that, under these circumstances, an ordinary jerk or jolt would cause him to lose his equilibrium. We agree with counsel for respondent that, while it is the law that one who rides upon a mixed train assumes the usual and incidental jerks necessary in the operation of the train, he does not assume the extraordinary jerks and jars resulting from the negligence of those operating the train. There is, however, no evidence in the case that the jerk causing respondent's injury was of the latter kind, and until there is some evidence of that fact, the law will assume that, since freight trains will jerk and jar, when one testifies he was injured by a jerk or jar on such a train, without going farther and coupling it with some negligent act, the jerk was the ordinary jerk assumed as an incidental risk to such a journey.

It is also contended by respondent, and the court below in effect so charged the jury, that the rule of *res ipsa lo-*

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quitur applies to cases of this character, and that it was incumbent upon appellant to show its freedom from negligence. Such a rule, admitting its force in a proper case, has no application here. It can only be applied under circumstances where the act itself is of such a character that with due care it would not ordinarily happen. *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912 D. 433. So far as we know, it has never been applied to a case where the injury resulted from an ordinary incident. As applied to railways, it has been held that, where the injury was the result of a collision, derailment, or some defect in the roadbed, cars, or equipment of the train, the rule under discussion was properly applied; but it is not the law that, where a passenger upon a railway train is injured, with no showing of some facts of the nature of those above referred to, there is a legal presumption of negligence, casting upon the carrier the burden of disproving it. *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621; *De Yoe v. Seattle Elec. Co.*, 53 Wash. 588, 102 Pac. 446, 104 Pac. 647, 1133. See, also, *St. Louis & S. F. R. Co. v. Gosnell*, *supra*, where many cases supporting the rule as here announced are cited.

For these reasons, it was error to deny appellant's motion for judgment notwithstanding verdict. The judgment is reversed, and the cause remanded with instructions to dismiss.

MOUNT, MAIN, and ELLIS, JJ., concur.

[No. 10862. Department Two. February 8, 1913.]

DANIEL B. PATTERSON, *Appellant*, v. THE CITY OF EDMONDS
*et al., Respondents.*¹

MUNICIPAL CORPORATIONS — INDEBTEDNESS — LIMITATIONS — DEBTS SUBJECT—UNNECESSARY EXPENSES. Const., art. 8, § 6, prohibiting any indebtedness by a city in excess of a certain limit, has no application to such obligations as are made mandatory by the constitution and laws and necessary to maintain its corporate existence; but does not embrace expenses for a city dock, the improvement and repair of city streets not dangerous or requiring immediate attention, auditing books, sewer estimates, street lights, a typewriter, killing dogs, printing, court fees, and salaries which the city chooses to make but not reduced to a bare necessity, all of which relate more to the welfare of the city than to its corporate existence.

SAME. Indebtedness in excess of the constitutional limit may be created for the expense of holding a city election and for salaries of necessary city officers and supplies necessary to carry on the government.

SAME—ACTIONS TO RESTRAIN CITY—JUDGMENT. In an action to restrain the issuance of bonds to refund warrants issued in excess of the constitutional limit, the judgment should be confined to that issue, and should not undertake to confirm the proceedings of the city council.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered October 14, 1912, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the issuance and sale of municipal bonds. Reversed.

W. J. Daly, for appellant.

Parker & Brown, for respondents.

FULLERTON, J.—The city of Edmonds, in Snohomish county, is a municipal corporation duly organized under the general laws of the state of Washington as a city of the third class. The assessed valuation of its property for the year 1910, as it appeared upon the last assessment roll taken for

¹Reported in 129 Pac. 895.

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city purposes, was \$399,763. Between May 5, 1910, and December 29 of the same year, the city became indebted for ordinary municipal purposes in the sum of \$5,849.23, or practically in a sum equal to one and one-half per centum of its taxable property as shown on its assessment roll, all of such indebtedness being represented by interest bearing warrants drawn upon the city treasurer. Thereafter, without in any manner reducing the indebtedness thus created, it incurred further indebtedness and issued interest bearing warrants therefor, which on March 12, 1912, amounted to the aggregate sum of \$13,145.61, making the total indebtedness of the city on that date the sum of \$18,994.84.

On the date last named, the city determined to issue funding bonds to take up and cancel the outstanding warrants above mentioned, and to that end passed a resolution so providing, and thereafter published a notice calling for bids for the bonds proposed to be issued for that purpose. At the time appointed, a satisfactory bid for the bonds was received and accepted by the city, and thereafter a contract was entered into for the sale of the bonds, between the city and the firm making the bid.

Before the sale was consummated, however, the present action was begun, ostensibly to restrain the issuance and sale of the bonds. The plaintiff says in his brief that it is a "friendly suit" to test the validity of the warrants, while the defendant says that it is a "proceeding to validate" them. The complaint sets forth the facts substantially as we have outlined them, and prays that the city be restrained from issuing and delivering the bonds. The answer of the city sets out the warrants in detail according to their number and date of issuance, dividing them into some thirteen different classes according to the purposes for which they were issued, and recites, in a more or less general way, the specific purpose for which each of the several warrants was issued. On the hearing, the city clerk and city treasurer were called as witnesses and testified concerning the purposes for which the

warrants sought to be funded were issued. The trial judge ruled that the warrants were valid obligations of the city, that the proceedings had by the city council with reference to funding the bonds were regular, and entered a judgment in which it was "ordered, adjudged and decreed that the said warrants issued by the city of Edmonds and hereinafter described under the" several subdivisions as set forth in the answer "be and are necessary and lawful indebtedness of said city . . . and are a valid and subsisting obligation against said city" for the amounts thereof, with interest as provided by law.

The judgment also contains the following:

"And it further appearing to the court that the said proceedings of the city council of the city of Edmonds relative to the funding of said warrants and the sale of said bonds were and are regular and valid, and that the notice for the sale of said bonds was and is good and sufficient. It is therefore ordered, adjudged and decreed that the said notice for the sale of said bonds be and is sufficient and valid, and that the acts and proceedings of the city of Edmonds relative to the sale of said bonds be and the same are hereby approved and confirmed.

"And it also appearing to the court that the bid of Carstens and Earles for said bonds was the most advantageous bid received for the same. It is therefore, ordered, adjudged and decreed that the sale of said bonds to Carstens and Earles be and the same is hereby approved and confirmed.

"It is ordered, adjudged and decreed that said bonds be and are regular and valid and a subsisting obligation against the city of Edmonds for the amount of said bonds and according to the tenor and effect of said funding bonds, to wit: for the sum of \$18,994.94 and accrued interest on said warrants to the date of payment thereof."

From the judgment so entered, the plaintiff appeals.

The provision of the constitution limiting the indebtedness that may be incurred by municipalities of the character of the one here in question is found in § 6, of art. 8, and reads as follows:

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“No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, That no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: Provided further, That any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality.”

This clause of the constitution would seemingly render void any and all indebtedness incurred for any purpose which exceeded the limitations therein prescribed. This court has, however, laid down the rule that the limitation imposed has no application to such obligations as are made mandatory on the municipality by the constitution and laws of the state, or to such as are necessary to maintain its corporate existence. *Rauch v. Chapman*, 16 Wash. 568, 48 Pac. 253, 58 Am. St. 52, 36 L. R. A. 407; *Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583; *Hull v. Ames*, 26 Wash. 272, 66 Pac. 391, 90 Am. St. 743; *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189; *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873. It is on the latter principle that the trial court upheld the validity of the indebtedness incurred in excess of the constitutional limit. It held that all of such indebtedness was incurred for matters necessary and essential to the corporate existence of the municipality, and hence valid obligations against it.

With this conclusion of the trial court, we have been unable to agree. There are, we think, many items of expenditure among those listed that clearly cannot properly be said to be necessary to the maintenance of the corporate existence of the city, and many more which, owing to the meagerness of the record, are at least in the doubtful class. Indeed, it would appear that the city authorities did not regard passing the indebtedness line as a matter of very serious moment. They apparently conducted the affairs of the city thereafter pretty much as they did before; expenditures being made and debts incurred for matters pertaining rather to the general welfare of the city than to the maintaining of its mere corporate existence. For example, a city dock was constructed at a cost of \$6,351.70; an indebtedness incurred for supplies and labor on the streets in the sum of \$537; an indebtedness for city printing in the sum of \$359; for supplies for the health officer in the sum of \$78.50; for court fees in the sum of \$220.55; for lighting the public buildings and public streets in the sum of \$1,179.37; for auditing the books of the city, \$71; for sewer estimates, \$123; for installing street lights, \$136.10; for a typewriter, \$102.50; for engineering expenses, \$317.24; for killing dogs, \$3; and for fees for various city officers, sums aggregating \$3,316.51.

Manifestly, if the city may lawfully become indebted for much of the foregoing after it has reached its limit of indebtedness, the constitutional prohibition has no meaning. The city dock is doubtless highly useful and convenient to the people of the city, and the cost of its construction permissible expenditure on the part of the city were it in a position to act for the general welfare of the people, but it is an absurdity to say that its construction was necessary to maintain the corporate existence of the city. So with the expenditures for work and supplies in the improvement and repair of the city streets. It might be that if some part of a street should become dangerous so suddenly as to require immediate attention, it would justify the incurrence of an in-

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debtedness to repair it as a work of necessity; but certainly the injury caused by all ordinary wear and tear, the necessity to repair which can be foreseen for a period of time preceding the point of danger, can be repaired at the cost of property benefited without resorting to this extraordinary remedy. The items for auditing the books of the city, for sewer estimates, for installing street lights, for a typewriter, and for killing dogs, are clearly all expenditures relating to the welfare of the city rather than to the maintenance of its corporate existence. Moreover, it would seem that the work of auditing the books and of killing dogs could properly have been imposed upon some one or more of the officers of the city who were drawing a salary therefrom, instead of making it a charge upon the general fund. So, also, with regard to the expenditure for city printing, for supplies to the health officer, for lighting the streets, for court fees, for fees and salary of city officers; these might be justified up to a certain limit on the ground of necessity, but clearly all such expenditures as the city chooses to make in this behalf cannot be so regarded. Expenditures of this kind must be reduced to a bare necessity, to those expenditures without the incurrence of which the city government cannot be carried on, before the expenditure is justified. So with other items of indebtedness not herein specially enumerated; they may or may not be legitimate expenditures, accordingly as they may have been incurred, or for mere public convenience.

These considerations require a reversal of the judgment entered in the court below. The record however is not sufficiently full to enable us to direct such a judgment as the probable justice of the case requires. The indebtedness incurred up to the constitutional limitation is, of course, legitimate and could be lawfully converted into funding bonds. A considerable part of the indebtedness incurred after that time is also clearly legitimate; such, for example, as that incurred in holding city elections, salaries of necessary municipal officers, and expenditures for supplies necessary to

carry on the city government. Other items represent a mixed class which may be legitimate or not, depending, as we have said, on the question whether the particular thing for which the indebtedness was incurred represented a necessity or only a convenience. As to these, further evidence concerning the particular service rendered or the particular thing purchased must be taken before the status of the debt can be known. Other items again, and some of them we have pointed out, do not represent a legitimate expenditure tested by any theory. We have concluded therefore to reverse the judgment, and remand the cause for such further proceedings as the parties may deem fit to take in consonance with this opinion.

It is but justice to the trial judge to say that it rested its judgment on the authority of *Gladwin v. Ames, supra*, wherein this court sustained as legal certain indebtedness incurred by the town of Cheney, although issued after the town had reached its limit of indebtedness. It must be confessed that the opinion in that case contains language which, read apart from the record then before the court, would seem to justify as legitimate expenditures on the part of a municipality some of the expenditures which we have here condemned. But while we said in that case that the particular indebtedness incurred for the purposes specified were legitimate expenditures, it was not intended to be said that all such indebtedness as might be incurred for the purposes mentioned would be legitimate. For example, an indebtedness was there approved which was incurred for the purchasing of materials and the erection of a city jail; but, clearly, had the jail been an elaborate structure in excess of the immediate necessities of the city, the debt incurred would not have been legitimate. The case, however, even within its proper limitations, goes beyond any holding theretofore made by the court, and perhaps beyond a legitimate construction of the section of the constitution in question. We prefer, therefore, rather to curtail the rule as there announced than to extend it.

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Syllabus.

We have set forth something of the nature and form of the judgment entered by the court below. We think it could hardly be said to be proper in these respects were it otherwise regular. The action was to restrain the issuance of bonds to refund certain warrants thought to be illegally issued. The judgment should have been confined to this issue. Clearly, the courts have no authority by judgment to "approve and confirm" the action of municipalities. The judgment is reversed and the cause remanded.

MOUNT, MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 10508. Department One. February 10, 1913.]

THOMAS ZOLAWENSKI *et al.*, *Respondents*, v. THE CITY OF ABERDEEN, *Appellant*.¹

BRIDGES—INJURIES—DUTY TO REPAIR—MUNICIPAL CORPORATIONS—STREETS. A city owes the duty to keep its bridge in a reasonably safe condition for travel, and is liable to a traveler who is injured without neglect on her part by reason of an unsafe condition of which the city, in the exercise of reasonable care, had, or ought to have had, knowledge.

HUSBAND AND WIFE—INJURIES TO WIFE—DAMAGES—LOSS OF SERVICES. In an action by a husband and wife for personal injuries sustained by the wife, the loss by the husband of the wife's services is a proper element of damages.

TRIAL—INSTRUCTIONS—REQUESTS. Want of more specific instructions on a subject cannot be objected to in the absence of a request therefor.

DAMAGES—AGGRAVATION OF INFIRMITY—TRIAL—ISSUES AND PROOF—INSTRUCTIONS. Although the plaintiffs, in a personal injury case, contended that the injured party was sound in body prior to the injury, the court may, on evidence tending to show a bodily infirmity, frame its own instructions so as to permit the jury to award damages for aggravation of a bodily infirmity.

TRIAL—INSTRUCTIONS—REQUEST. Error cannot be predicated on failure to instruct upon the subject of contributory negligence, in the absence of any request therefor.

¹Reported in 129 Pac. 1090.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$500 damages from a fall is supported by evidence that the plaintiff did ordinary housework prior to the injury, besides milking cows and caring for swine, and afterwards was completely incapacitated and suffered a prolapsus of the uterus.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered December 4, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian through a defective bridge. Affirmed.¹

A. E. Graham, for appellant.

Frank Beam, for respondents.

GOSE, J.—This is an action to recover for personal injuries sustained by the plaintiff wife. The gravamen of the charge is, that a certain bridge in the defendant city formed a part of a public street; that it was used by pedestrians; that there was a hole in the bridge, which had existed for a period of five or six months before the date of the alleged injury; that the plaintiff wife stepped into the hole, fell, and “that she was thereby bruised about the legs and body, and that the skin was peeled and scraped from her leg, and that by being thrown to the floor of said bridge, prolapsus uteri was caused and brought about; that is, her genital and urinary organs were displaced and dislodged.” The answer joined issue upon the alleged defect in the bridge and the injury, and alleged affirmatively that, if the plaintiff wife received the injury, it was caused by her own negligence, and that if the defect in the bridge existed “which defendant denies,” she knew of its existence and assumed the risk. There was a verdict and judgment for the plaintiff for \$500. The city prosecutes the appeal.

The court instructed, that it was the duty of the city to keep the bridge in a reasonably safe condition for the traveling public; that if it permitted it to become unsafe or dangerous with knowledge of its condition, or when, in the exer-

¹Rehearing *En Banc* ordered.

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Opinion Per Gose, J.

cise of reasonable care and diligence, it ought to have known its condition, and that by reason of its unsafe condition the respondent wife, without neglect on her part, was injured as alleged in the complaint, the respondents were entitled to recover reasonable compensation for the injury. Error is assigned to this instruction. The instruction correctly states the law. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Lorence v. Ellensburgh*, 13 Wash. 341, 43 Pac. 20, 52 Am. St. 42; *Short v. Spokane*, 41 Wash. 257, 83 Pac. 183.

The court instructed:

"In estimating the damage to plaintiffs, if you find for them, you should in so far as is shown by the evidence take into consideration the physical pain and mental suffering of the plaintiff Magdalena Zolawenski, the temporary and permanent injuries if any suffered by her [and if you find plaintiffs are husband and wife, you will also take into consideration what loss the husband has or will sustain by reason of the inability of the wife to perform the duties of a wife, in so far as the evidence shows such loss]."

Error is assigned to that portion of the instruction in brackets. The loss of the wife's services is a proper element of damages. *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808. If the appellant desired a more specific instruction on the question of the loss of the wife's services, it should have requested it, and having failed to do so, it is not in a position to assign error. *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105; *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355.

The court instructed that, if the jury should find that the respondents were entitled to recover by reason of the negligence of the appellant, and should be of the "opinion" that the wife "was at the time of the injury infirm in body, and that such infirmity was aggravated by the injury," they should "estimate" from the evidence the amount that should be allowed "for such aggravation." The instruction is a correct

statement of the law. *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743; *Short v. Spokane*, *supra*. The criticism is that the respondents contended that the wife was sound in body prior to the injury, and that they were not entitled to an instruction based upon the theory that an infirmity may have antedated the injury. The rule, however, is that the court may frame its instructions, upon its own motion or at the suggestion of counsel, to cover the issues as they are actually made upon the trial of the case.

There was no error in denying the appellant's requested instructions. In so far as they correctly stated the law, they were, in substance, embodied in the instructions given by the court.

Error is assigned in the failure of the court of its own motion to instruct on contributory negligence and assumed risk. This was not error for two reasons: (1) although pleaded, there was no evidence to support either affirmative defense; the appellant's contention was that there was no hole in the bridge into which the respondent could have stepped. (2) If the appellant conceive that there was such evidence, it should have requested instructions adapted to its view of the case. Failing to do so, it cannot make a claim of error. *Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

The last point pressed is that the evidence is insufficient to support the verdict. It suffices to say that the evidence tends to show that the respondent wife was apparently in sound health before she met the injury; that she was doing the ordinary work of a housewife, and, in addition, milking two cows and caring for some swine, and that after the injury she was completely incapacitated for doing her ordinary household work. The physicians testified that, at the time of the trial, she had a "complete prolapsus of the uterus." It is true that they said that they found an ulcerated condition "at the neck of the cervix" that antedated

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the injury, but some of them said that the prolapsus may have been produced or aggravated by a fall.

It is insisted that the case is a counterpart of *Hoyt v. Independent Asphalt Paving Co.*, 52 Wash. 672, 101 Pac. 367. In that case the late Chief Justice Dunbar pointed out that the family physician testified that the condition which was the subject of inquiry "could not have been caused" by the fall. The jury resolved the controverted facts against the appellant upon substantial evidence, and its conclusion is controlling.

The judgment is affirmed.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10286. Department Two. February 13, 1913.]

In the Matter of the Improvement of TWENTY-SECOND AVENUE SOUTHWEST.

THE CITY OF SEATTLE, *Appellant*, v. WILLIAM MOELLER, *Respondent*.¹

HIGHWAYS—ESTABLISHMENT—PRESCRIPTION — EVIDENCE — SUFFICIENCY. A sixty-foot strip of land, petitioned for as a county road in 1873, is not established as a highway by prescription, where its use as a highway was begun in 1895, without record authority, and was interrupted in 1904 by placing fences with gates across it and posting notices declaring it to be private property; since the use was not uninterrupted and continuous for ten years.

ESTOPPEL—BY RECORD—HIGHWAYS—PETITION TO VACATE. A petition to vacate a portion of a highway does not estop the signer from asserting title thereto, on denial of the petition, where the necessary elements of an estoppel are not present.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 6, 1912, in favor of the defendant, vacating an assessment roll for a local improvement, after a trial on the merits before the court. Affirmed.

¹Reported in 129 Pac. 884.

James E. Bradford and *William B. Allison*, for appellant.
Bostwick & Steele, for respondent.

MAIN, J.—This is an appeal by the city of Seattle from a judgment of the superior court of King county, setting aside an assessment roll for local improvement district No. 2,497, for the improvement of Twenty-second avenue southwest.

The property within the confines of the district is owned by William Moeller, the Coryell Investment Company, a corporation, and the Westerman Iron Works, a corporation. There was exempted and excepted from the assessment roll a strip of land sixty feet wide extending across the entire width of the district. The sole question involved in this appeal is whether this sixty-foot strip is private property or a public highway.

Some time during the year 1875, certain persons living in proximity to the property now confined within the limits of the assessment district, and others living more remote therefrom, desired that a county road be laid out and established, starting from a certain fir tree located on what is known as Alki Point, and extending by a somewhat circuitous route in a general southeasterly direction toward the then suburb of the city of Seattle, known as Georgetown. To this end a petition was prepared and presented to the board of county commissioners of the county of King, requesting that road No. 51 be laid out and established over the route indicated. The county commissioners took no steps to acquire title to the property over which the proposed highway should pass, either by a condemnation proceeding or by receiving conveyances therefor, at least as to that portion of road No. 51 involved in this proceeding. Nothing further appears to have been done until the fall of the year 1895, when it was opened for traffic, and from that time until August, 1904, more or less traffic passed over that portion of the route of the proposed highway which is involved in this

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proceeding. August 12, 1904, the respondent, William Moeller, purchased property which he now owns within the district, and immediately thereafter began the erection of a house thereon, which stood in the path of the highway; and he also erected, or caused to be erected, fences across the proposed highway, permitting the public, however, to pass through by means of gates. During the earlier part of the year 1904, notices had been posted upon the property in question, which declared it to be private property. On March 17, 1905, the respondent, Moeller, together with a number of other persons owning property in the vicinity, and certain persons who were not property owners therein, petitioned the county commissioners for the vacation of certain portions of proposed road No. 51, including that portion involved in this proceeding. The petition was denied.

During the year 1907, the boundaries of the city of Seattle were extended so as to include the property now within assessment district No. 2,497. The strip of land exempted from assessment by the assessment roll is that over which proposed road No. 51 passed. This sixty-foot strip has continuously been assessed for general taxes, and such taxes have been paid. It has also been assessed by the city of Seattle a number of times for certain local improvements.

In the trial court, the parties to this proceeding entered into a stipulation by which the issues submitted to that court were confined to one question, and that is, as to whether or not the sixty-foot strip within the assessment district, which was exempted from the assessment, is a street or highway, or private property. That portion of the stipulation which is pertinent to the inquiry here is as follows:

“It is further stipulated and agreed that if it be established by the city of Seattle upon the trial of this cause that the said sixty-foot strip of land omitted from said assessment roll is a public highway and thoroughfare, then the assessment roll shall be confirmed; but if the city of Seattle shall fail to establish the said sixty-foot strip of land as a public highway and thoroughfare, then said assessment roll shall be set

aside and returned to the proper authorities of the city of Seattle, to be recast in accordance with the direction of the court, to include therein the said sixty-foot strip, or such portion thereof as shall not be established as public highway or thoroughfare."

The trial court found it to be private property, and directed that the assessment roll be recast. The city appeals.

The appellant's first contention is that the sixty-foot strip of land in question became a public highway by general, uninterrupted, and continuous public use. In order to establish a highway by prescription, it is necessary that the public use must be general, uninterrupted, and continuous for a period of ten years, under a claim of right. This court, in *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204, states the principle in these words:

"To establish a highway by prescription there must be an actual public use, general, uninterrupted, and continuous, for ten years, under claim of right."

The undisputed facts in this case are that the public use of the sixty-foot strip in question began during the fall of the year 1895, and was interrupted during the month of August, 1904, provided the placing of the fences across the sixty-foot strip, with gates placed therein for the public to pass through, and the posting of notices declaring it to be private property, are sufficient to arrest the running of the prescriptive right. On this question the law appears to be, that any unambiguous act by the owner which evidences his intention to exclude the public from the uninterrupted use of the highway destroys the immature prescriptive right. *Jones v. Davis*, 35 Wis. 376; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484. In *Shellhouse v. State*, there is found this paragraph:

"A highway, from its very nature, must be open to the public use day and night, and any unambiguous act by the owner, such as erecting gates or bars over the highway, which evidences his intention to exclude the public from the

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uninterrupted use of the highway, destroys the prescriptive right, unless it had fully matured before it was interrupted."

We think that the posting of notices and the erection of the fences and gates by the respondent, Moeller, destroyed the prescriptive right in the sixty-foot strip in question, for the reason that such right had not fully matured when the intention to exclude the public from the uninterrupted use of that portion of the highway was manifested.

The appellant also contends that the respondent, Moeller, is estopped from asserting that the sixty-foot strip is not a public highway, by reason of the petition which he and others filed with the county commissioners on the 17th day of March, 1905, praying that this strip, together with other portions of the highway, be vacated. We have examined this petition with care, and find nothing in it to justify such a conclusion. The necessary elements of an estoppel are not present. The appellant in its brief cites no authority in support of this contention, and by an independent investigation we have discovered none.

The appellant in its brief argues at length, and cites numerous authorities to the effect, that a highway once established cannot be vacated except in the manner provided by statute. The vice in this argument, as applied to the present case, is that it assumes a fact which the undisputed evidence in the record negatives. This argument is based on the assumption that a highway had become fully established by prescriptive right, while the facts are that the prescriptive right was arrested before it matured.

The judgment is affirmed.

MOUNT, ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 10679. Department Two. February 13, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. TOM RICE,
Appellant.¹

APPEAL—RECORD—AFFIDAVITS. Error in recalling the jury and giving additional instructions cannot be shown by affidavits, nor reviewed in the absence of a bill of exceptions or statement of facts.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 27, 1912, upon a trial and conviction of robbery. Affirmed.

William R. Bell, for appellant.

John F. Murphy, Crawford E. White, and Reah M. Whitehead, for respondent.

MAIN, J.—The defendant in this case was charged in the superior court by information with the crime of robbery. In due time he was tried and a verdict of guilty returned. Motion for a new trial was seasonably made and overruled, and the defendant sentenced to the state penitentiary at Walla Walla. From this judgment and sentence, the defendant appeals.

No statement of facts or bill of exceptions has been brought to this court. The appellant in his brief assigns error in that the trial court, while the jury were deliberating upon their verdict, of its own motion recalled the jury into open court and gave them additional instructions. The facts surrounding the recalling of the jury are set out by affidavit, a copy of which appears in the transcript which was certified by the clerk. The respondent objects to the consideration of this affidavit for the reason that it is not properly before this court. This contention must be sustained. Under the repeated decisions of this court, affidavits used upon a hearing before the trial court cannot be made

¹Reported in 129 Pac. 911.

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a part of the record on appeal by simply incorporating them in the clerk's transcript. *Spoar v. Spokane Turn-Verein*, 64 Wash. 208, 116 Pac. 627; *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190; *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984.

In the *Hayworth* case, the court, in deciding a similar question, said:

"The appellants failed to propose or have certified into this court any statement of facts, and the case is here on a transcript of so much of the record as the appellants have seen fit to direct the clerk to transmit to this court. In the record so certified, are copies of two affidavits filed for use on the motion to vacate the judgment. The respondent objects to the consideration of these affidavits on this appeal on the grounds that they are not properly a part of the record, the same being in the nature of evidence which can only be brought to this court by a statement of facts. This objection is well taken. We have, in a long line of cases, held that affidavits filed as proof of particular facts cannot be made a part of the record in this court by the mere certification of the clerk. *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873; *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190, and cases cited."

There being no assignment of error in the record which we can consider, the judgment will therefore be affirmed.

CROW, C. J., ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 10807. Department Two. February 13, 1913.]

NEWTON C. GAUNTT, *Appellant*, v. CHEHALIS COUNTY,
*by its Board of County Commissioners, Respondent.*¹

CONTRACTS—CONSTRUCTION — ARCHITECT'S CONTRACT — PAROL EVIDENCE TO EXPLAIN WRITING. A contract employing an architect to prepare plans for a courthouse on a percentage basis in the event of the building going ahead at some future time, and for the payment of \$1,000 in case the contract for the "building" should not be let, is plain and unambiguous, and the county is not liable in excess of \$1,000 if a building is not erected on the plans prepared; hence parol evidence is inadmissible to explain the contract.

SAME—EVIDENCE—MATERIALITY. In such a case, evidence that the county had not abandoned its purpose to construct a courthouse is immaterial.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered March 30, 1912, upon granting a nonsuit, dismissing an action on contract. Affirmed.

W. H. Abel, Arthur I. Moulton, and T. H. McKay, for appellant.

Wm. E. Campbell and J. E. Stewart, for respondent.

MAIN, J.—This is an action on a contract, to recover money alleged to be owing, due, and unpaid. On November 13, 1906, Gauntt, the appellant, entered into a written contract with the respondent, the board of county commissioners of Chehalis county. Under this contract the appellant was to prepare plans and specifications for a courthouse building, to be erected at Montesano, Washington, and deliver them to the respondent on December 3, 1906. On or prior to this date, the plans and specifications were prepared and delivered as required by the contract. At the time of their delivery, the respondent paid to the appellant the sum of \$1,000, and by resolution declared its intention of taking no

¹Reported in 129 Pac. 888.

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further immediate action relative to the erection of the building. The compensation of the appellant as specified in the contract was to be two and one-half per cent of the cost of the proposed building for the plans and specifications, and two and one-half per cent additional for supervising the erection thereof, the total cost of which was not to exceed the sum of \$100,000. That portion of the contract, the construction of which is involved in this proceeding, is as follows:

“It is understood and agreed by both parties to this contract that should contract for building not be let, then the party of second part is to receive the sum of one thousand dollars (\$1,000) only for plans and specifications, same to be applied as part payment in the event of the building going ahead at some future time.”

On April 6, 1909, the respondent advertised for plans and specifications for a modern fireproof courthouse building. In response to such advertisement, and on May 3, 1909, the appellant, one Watson Vernon, and a number of other architects submitted plans and specifications. On July 6, 1909, the plans and specifications submitted by Vernon were accepted, and pursuant to these plans, a courthouse was subsequently erected, the contract therefor being let on November 5, 1909. Subsequent to the completion of the building according to the Vernon plans and specifications, and prior to the institution of this action, the appellant presented to the respondent a claim for the sum of \$3,400. Of this amount \$1,500 was claimed as the balance due for the plans and specifications, and \$1,900 as the profits which the appellant would have made from the superintendence of the erection of the building. The claim was disallowed. Thereupon this action was begun. During the progress of the trial in the superior court, the appellant offered oral testimony to explain the terms of the contract, and also to show that the respondent at no time subsequent to November 13,

1906, had abandoned its intention of erecting the courthouse. To these offers of proof the respondent objected. The objections were sustained by the trial court. At the conclusion of the appellant's evidence, the respondent challenged the legal sufficiency of the evidence, and its challenge was sustained by the court. The action was dismissed. The cause is brought here on appeal.

The appellant assigns as error the rulings of the trial court in refusing to permit the introduction of oral testimony, (1) to explain the terms of the written contract; and (2) that the respondent had at no time since November 13, 1906, abandoned its intention to erect a courthouse building. The ultimate question to be determined upon this appeal is, What is meant by the term "the building" in the paragraph of the contract above quoted? The appellant contends that it means any courthouse building which the respondent might thereafter erect, and that oral evidence was admissible to show that this was the intention of the parties to the contract. With this we do not agree. The contract is plain and free from ambiguity, and its meaning must be determined from the language used. The term "the building," in the paragraph of the contract quoted, refers to the building to be erected under the plans and specifications prepared by the appellant. It does not refer to a building that might be erected according to plans and specifications prepared by any other architect. The contract does not obligate the respondent to erect a building according to the plans and specifications of the appellant. The obligations of the respondent under the contract were fulfilled when the appellant was paid the \$1,000, unless it should subsequently erect a building according to the appellant's plans and specifications. The evidence shows that this it did not do.

The evidence offered, to show that the respondent had at no time since the execution of the contract with the appellant abandoned its intention to erect a courthouse building,

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was clearly immaterial. Whether it had or had not abandoned such intention would neither enlarge nor minimize the rights of the appellant under the contract.

The judgment is affirmed.

Crow, C. J., Ellis, Morris, and Fullerton, JJ., concur.

[No. 10943. Department Two. February 13, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. MEYER COHEN,
Appellant.¹

JURY—COMPETENCY—BIAS—CHALLENGE—EVIDENCE—SUFFICIENCY. The fact that a juror considered the arrest of the accused as a "suspicious circumstance," does not subject him to a challenge for actual bias, where it appears that he meant that there were circumstances justifying the officers, in their opinion, in making the arrest, and that he realized a man could be arrested without being guilty, and would not convict unless the state proved his guilt beyond a reasonable doubt.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. Statements of counsel in argument are not ground for reversal where they were not prejudicial.

CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. Error cannot be predicated on improper conduct of counsel for the state in disclosing a picture of the accused while an inmate of an eastern prison, where it does not appear that any of the jurors saw it or had any intimation of what it was.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 5, 1912, upon a trial and conviction of grand larceny. Affirmed.

Louis I. Lefebvre, for appellant.

J. L. McMurray, *A. O. Burmeister*, and *G. C. Nolte*, for respondent.

MORRIS, J.—Appeal from a conviction of grand larceny by embezzlement. Many errors are assigned in the brief, but

¹Reported in 129 Pac. 891.

on the oral argument counsel for appellant called our attention to but three upon which he relies for a reversal. The first of these is that the court erred in denying a challenge for cause as against a juror on his *voir dire* examination. The claim is made that the examination of the juror disclosed that he was biased in favor of the state, and not possessed of that impartial and unprejudiced mind required by the law of trial jurors. The examination of this juror takes up twelve pages in the record, and no fair statement of his mental condition upon the point to which appellant takes exception can be given without reciting his entire examination, as every answer is more or less qualified by what precedes or follows it. The main attack upon the juror's mental condition is based upon his statement that he considered the arrest of the appellant as a "suspicious circumstance." It is apparent, from the whole examination, that the juror meant by this expression that he assumed, from the fact that an information had been filed upon which appellant had been arrested and brought to trial, that there were circumstances which, in the opinion of the officers of the law, would justify such a course. He realized, however, that "a man could be arrested and not be guilty," and before he would convict he would require the state to prove guilt beyond a reasonable doubt. Upon the whole examination, as disclosing the mental attitude of the juror and the degree and character of proof he would require before he would convict the appellant of the crime charged, we are of the opinion that no error was committed in the denial of the challenge.

The next error urged is that counsel for the state in addressing the jury made certain statements not justified by the record which were highly prejudicial. We will not review these statements, as it would take too much time and space to set forth that part of counsel's address of which they form a part. We, however, have carefully considered them in connection with appellant's criticism, and do not believe his claim of error as to these matters is well founded.

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It is next urged that one of the deputies of the prosecuting attorney assisting in the trial exhibited to the jury, during the progress of the trial, a picture of appellant, claimed to have been taken while he was an inmate of an eastern penitentiary. The court's attention was called to this charge, and the court dismissed the jury and made a full investigation into the matter, taking testimony of those who claimed knowledge of the matter. We agree with the conclusion reached by the court that nothing more is shown than that the assisting counsel, in going through his files seeking a copy of the information, may have uncovered this picture to the notice of any observing him. This occurred during the examination of one of the witnesses by other counsel for the state. It does not appear that any of the jurors saw the picture, or that they would have had any intimation of what it was had they seen it. Neither does it appear that there was any design or purpose to exhibit the picture to the jury. We find nothing here to sustain the claim of error, or that there was in the circumstance anything which had, or had a tendency to have, the slightest effect upon the jury in determining the guilt or innocence of the appellant.

Finding no error in the record, the judgment is sustained.

CROW, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 10674. Department One. February 13, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. LEONARDO
FERRATO *et al.*, *Appellants*.¹

INDICTMENT AND INFORMATION—LARCENY—BY BUNCO GAME—SUFFICIENCY. Under Rem. & Bal. Code, § 2601, subd. 2, providing that every person who with intent to deprive the owner of any property by any trick, device, bunco game or fortune telling . . . steals such property and shall be guilty of larceny, an information is sufficient if, rejecting additional matter as surplusage, enough remains to charge the offense in the language of the statute, in the absence of any motion to strike or make more definite, even though it did not describe any trick, fraud or device.

LARCENY—BY TRICK OR "BUNCO GAME"—EVIDENCE—SUFFICIENCY. A conviction of grand larceny, by means of a trick, device or "bunco game," under Rem. & Bal. Code, § 2601, subd. 2, is sustained, although the game played was an innocent game of skill, where it appears that the prosecuting witness was induced by three confederates to engage in a game of bocce with a reputed stranger as an adversary, who was skilled in the game, that he was allowed to win a few games, his measure taken, and then induced to play for \$3,000, the confederates pretending to contribute \$5,000 towards a pretended \$8,000 stake, and that they never intended to allow him a chance to win, but stole and divided up his \$3,000 before the game was over; any game, whether innocent or not, being a "bunco game" if it is the design and conduct of those using it to give it that character.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 18, 1912, upon a trial and conviction of grand larceny. Affirmed.

William R. Bell, for appellants.

John F. Murphy, Hugh M. Caldwell, and H. B. Butler, for respondent.

CHADWICK, J.—The material parts of the information upon which appellants were tried follow:

"That said Leonardo Ferrato, Sisto Roe and Bendetto Arnardo, and each of them, in the county of King, state of

¹Reported in 129 Pac. 898.

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Washington, on or about the 26th day of March, 1912, with intent to deprive and defraud the owner thereof, did wilfully, unlawfully and feloniously obtain from one Jos. Aiassa, \$3,000 in lawful money of the United States, the property of the said Jos. Aiassa, by trick, device and confidence or bunco game, in this, that said Leonardo Ferrato, Sisto Roe and Bendetto Arnardo and each of them upon the pretense that he, the said Jos. Aiassa might win and receive from said Bendetto Arnardo a like sum of \$3,000 and the return of his own \$3,000 upon the result of a certain game of boccie to be then and there played, whereas the said Leonardo Ferrato, Sisto Roe and Bendetto Arnardo, and each of them, did not intend that the said Jos. Aiassa should receive the sum of \$3,000 of or from the said Leonardo Ferrato, Sisto Roe and Bendetto Arnardo, or either of them, nor did they or either of them intend that said Jos. Aiassa should or would have returned to him his own \$3,000 so paid to said Leonardo Ferrato, Sisto Roe and Bendetto Arnardo and each of them as aforesaid, and the said Leonardo Ferrato, Sisto Roe and Bendetto Arnardo and each of them upon receiving of and from said Jos. Aiassa the said \$3,000 in lawful money of the United States, did then and there take, steal and carry away the same, with intent to deprive and defraud the said Jos. Aiassa thereof, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

A demurrer to this information was filed by the defendants upon the grounds, (1) that several separate crimes and offenses are included therein; (2) that the facts pleaded are not sufficient to charge the crime of grand larceny; (3) that the facts stated in said information are insufficient to establish the commission of any crime by the defendants or either of them; (4) that the facts pleaded therein show that the defendants have not been guilty of any offense whatsoever; (5) misjoinder of several distinct offenses.

Appellants assume that the information was designed to charge a crime under Rem. & Bal. Code, § 2471, defining the crime of swindling, and that inasmuch as the information sets forth an agreement to play a game of chance or skill, and no

trick, fraud, or device is described, appellants should not have been put to trial, or, being convicted, are now entitled to an arrest of judgment. We think this position is not well taken. It is insisted by the state that the information was drawn under subd. 2, § 2601, Rem. & Bal. Code, which, in so far as it is material to the present charge, reads as follows:

“Every person, who with intent to deprive or defraud the owner thereof, shall obtain from the owner or another the possession or title to any property . . . by any trick, device, bunco game, or fortune telling . . . steals such property and shall be guilty of larceny.”

In the absence of a motion to strike or make more definite and certain, the parts of the information which are relied on to show that no crime is charged may be rejected as surplusage, and enough will be left under our practice allowing a crime to be charged in the language of the statute to pass the grounds of demurrer, and especially the ground that the information does not state facts sufficient to constitute the crime of grand larceny. The crime grand larceny being charged, and the part of the information objected to being treated as a matter of inducement, the information is sufficient; for we have a charge as nearly in the language of the statute as it can be made: “The said Leonardo Ferrato, Sisto Roe and Bendetto Arnardo and each of them, . . . by trick, device, and confidence or bunco game . . . upon receiving of and from said Jos. Aiassa . . . \$3,000 in lawful money of the United States, did then and there steal and carry away the same with intent to deprive and defraud the said Jos. Aiassa thereof, contrary to the statute,” etc.

It is next contended that the facts do not warrant the verdict; that the game of boccie is an innocent game, depending upon the skill of the players; that Joseph Aiassa, the prosecuting witness, voluntarily entered into the play for high stakes; that he admits that he expected to keep the money of his adversary if he won, and therefore no criminal

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charge can be sustained. In a sense, this is all true. But threading the whole narrative of the testimony, there is the track of fraud. It seems certain to us, as it did to the jury, that the prosecuting witness was the victim of a conspiracy to defraud him of his money. It is no defense that the game was as innocent as billiards, base ball, croquet, or wrestling. The game was an instrument in the scheme to bring the victim into play with an adversary, a reputed stranger who had been in this country but three months, and who, according to his own testimony, had taken several medals in the old country because of his skill as a boccie player. He was, to use the vernacular of the race track, a ringer. The defendants and Sisto Roe, who was not apprehended, did not intend to take any chance. Aiassa, the victim, was allowed to win two or three games played for small stakes. His measure was taken. It was then proposed that they play for a larger sum, and Aiassa drew nearly \$3,000 out of the bank. Sisto and Leonardo pretended to contribute with him enough to match the \$8,000 which Arnardo pretended to have. Sisto held the stakes. The game went on. During the game, Aiassa temporarily retired, and the three confederates decamped with the money. After dividing Aiassa's money equally, they fled to Butte, Montana, where Ferrato and Arnardo were apprehended. Sisto, the other confederate, escaped.

It is possible that, in the absence of a statute, one who lures another into a sure-thing game by exciting his cupidity might not be criminally liable. But fortunately the statute covers such cases. We think it is clearly proved that appellants never intended that Aiassa should win any money. They knew, as one of the appellants, who spoke at the trial of the others as his partners, admits, that Aiassa had no chance of winning against the skill of Arnardo, nor did they give him a chance if any he had. They stole the money before the game was over. The law does not demand, as a condition or as an element of the crime defined by our statute,

that the game employed by confidence men shall be an outlawed game. They sometimes employ them, but more frequently do they employ one that seems legitimate to the intended victim. Wrestling, foot racing, horse racing, pool, ten-pins, or any game of endurance, chance, or skill, is apt to be more attractive to the guileless, conceited, or avaricious than a chuck-a-luck, strap, panel house, or badger game, and less calculated to excite suspicion than the old-fashioned gold brick whatever its wrapping may be. Even outlawed games are innocent in themselves. Games never injure any one. It takes a crooked player to make a crooked game, and the law, as it is written in this state, is aimed against the man and not against the inanimate dice, cards, billiard or boccie balls. So any game, whether innocent or outlawed, may be a bunco game, for it is the design and conduct of those who use it that gives it its character under the statute. Any trick, artifice, or cunning calculated to win confidence and to deceive, whether it be by conversation, conduct, or suggestion, is a bunco game within the meaning of the statute.

The prosecuting attorney has cited the following cases, which sustain his theory and our conclusion: *People v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2; *People v. Mann*, 113 Cal. 76 (*People v. Mason*, 45 Pac. 182); *State v. Ryan*, 47 Ore. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862; *State v. Donaldson*, 35 Utah 96, 99 Pac. 447, 136 Am. St. 1041, 20 L. R. A. (N. S.) 1164; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372; *People v. Miller*, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. 546.

The testimony of the prosecuting witness is vigorously attacked. Certain differences between his testimony and that of other witnesses, and the fact that he did not publish the fact of the robbery until the next day, are relied on. The differences in the testimony, if any, appear trivial in the light of the whole record. Aiassa's delay in going to the police was explained to the satisfaction of the jury.

Error is predicated upon the giving and refusal to give

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instructions. We find no error in the instructions given, and the requested instructions were fully covered by those given to the jury by the court.

The judgment of the lower court is affirmed.

Crow, C. J., and Mount, J., concur.

PARKER, J. (concurring)—I concur in the result. I think that when appellants decamped with the money, before the close of the game, they committed plain grand larceny, regardless of whether the game was a so-called "bunco game" or a fair game. I am not ready to hold that the crime charged would have been committed had the game been completed and the staked money paid over in pursuance of the result of the game. I fear the majority opinion may be so construed.

Gose, J., concurs with PARKER, J.

[No. 10683. Department One. February 13, 1913.]

BLANCHE E. REDDISH BORELL *et al.*, Respondents, v.

MAIDA T. CARSON, Appellant.¹

APPEAL—DECISIONS REVIEWABLE—INTERLOCUTORY JUDGMENT—FINAL ORDERS. No appeal lies from an order adjudging a defendant in default for want of an answer, nor from an interlocutory order requiring the defendant to specifically perform the contract in suit and pay plaintiff the balance due on the contract within thirty days, and providing that, in the event that such order be not obeyed, the property shall be decreed to be sold to discharge a lien therefor, where no appeal was taken from such final decree entered thirty days later; since they are not final orders nor within Rem. & Bal. Code, § 1716, authorizing appeals from certain specified orders.

Appeal from orders of the superior court for Stevens county, Baske, J., entered January 15 and 29, 1912, ad-

¹Reported in 129 Pac. 908.

judging the defendant to be in default, and directing the specific performance of a contract. Dismissed.

A. C. Shaw, for appellant.

Guy B. Groff, for respondents.

PARKER, J.—This is an action to enforce specific performance of a contract for exchange of real property between the plaintiffs and the defendant, and to recover upon two promissory notes given by the defendant to the plaintiffs in connection with the exchange contract. The plaintiffs seek recovery upon three causes of action pleaded in their complaint; one for recovery upon each of the promissory notes, and one for specific performance of the exchange contract and the enforcement of a lien against certain of the property on account of money paid out by them. On January 15, 1912, the court entered an order adjudging the defendant to be in default, because of her failure to answer the complaint within the time fixed by a previous order of the court striking her second amended answer to the complaint. On January 29, 1912, after making findings of fact and conclusions of law, the court entered an interlocutory order, adjudging “that the defendant, Maida T. Carson, is hereby directed to specifically perform the contract set out and made part of the plaintiffs’ third cause of action . . . that the defendant pay to the plaintiffs herein, within thirty days from this date, to wit, on or before March 1st, 1912, the sum of \$1,852.10 . . . being the balance due under her contract specifically set out in plaintiffs’ third cause of action, and in the event that said defendant shall not obey said order within the time specified, that the property in Stevens county, hereinbefore described, shall be decreed to be sold to discharge the said lien.” Thereafter, on January 30, 1912, notice of appeal was served upon plaintiffs’ attorney, stating that the defendant appealed from the order of default of January 15, 1912, and from the order of Jan-

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uary 29, 1912, the latter order being the last act of the court in the cause. Thereafter, on March 7, 1912, the defendant having failed to comply with the interlocutory order of January 29, requiring her to pay the amount of the lien found against the property, a final decree was entered, foreclosing that lien and directing sale of the property in satisfaction thereof.

Counsel for respondents moves to dismiss the appeal, on the ground that the orders attempted to be appealed from are not final orders nor orders specifically mentioned in Rem. & Bal. Code, § 1716, from which appeal may be taken to this court. We are constrained to hold that this motion must be sustained. We are of the opinion that the orders attempted to be appealed from are neither of them a final judgment in the case, nor any of those specifically mentioned in the statute from which appeal may be taken to this court. Section 1716, Rem. & Bal. Code, and our former decisions thereunder are decisive in favor of respondents' motion to dismiss the appeal. *Yatsuyanagi v. Shimamura*, 57 Wash. 42, 106 Pac. 503; *Zellar v. Siemens*, 58 Wash. 116, 107 Pac. 1054; *Gilliland v. German-American State Bank*, 59 Wash. 292, 109 Pac. 1020. It is not pretended that any appeal has ever been taken from the final decree entered in this cause, which decree was entered more than a month after the appeal which is here sought to be prosecuted was taken.

The appeal is dismissed.

CROW, C. J., CHADWICK, MOUNT, and GOSE, JJ., concur.

[No. 10519. Department Two. February 13, 1913.]

C. E. JOHNSON, *Appellant*, v. M. HEIRGOOD *et al.*,
Respondents.¹

MECHANICS' LIENS—SALE AND DELIVERY OF MATERIALS—EVIDENCE—SUFFICIENCY. A finding that materials for a building were furnished to the contractor as an independent contractor, are sustained where both contractor and owner testified that such relation was fully disclosed, and they were corroborated by the bills sent out with the material.

SAME—MATERIALS—DUPLICATE STATEMENTS—NECESSITY. It is not a compliance with Rem. & Bal. Code, § 1133, requiring a person furnishing materials to a contractor for the construction of a building to mail or deliver duplicate statements to the owner of all such materials as a condition precedent to a mechanics' lien, for the driver of the wagon to deliver to the person on the grounds receiving the material duplicate statements of the contents of the loads, one of which was to be signed and returned as evidence of the delivery.

SAME—WAIVER. In such a case, the owner does not waive the statute by reason of the fact that, when one of the first loads was delivered, he declined to accept or sign the driver's statements or receipts, but referred him to the contractor, none of the parties treating such receipts as the notices contemplated by the statute.

SAME. Such statute is not waived by the fact that the owner had actual notice of the delivery of the material, and frequently inspected it, and caused part of it to be rejected.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered October 13, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

John M. Gleeson, for appellant.

Danson, Williams & Danson (George D. Lantz, of counsel), for respondents.

FULLERTON, J.—On September 5, 1910, the respondents Heirgood entered into a contract with the respondent

¹Reported in 129 Pac. 909.

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Charles Kolb, whereby the latter, for a stated consideration, undertook to furnish all necessary labor and material and erect for the former a dwelling house on certain lands owned by them, situated in Spokane county. Kolb procured the principal part of the material that entered into the construction of the house from the appellant Johnson, and on his failing to pay for the same, Johnson filed a lien on the dwelling house for the amount of the contract price of the materials furnished. Subsequently Johnson began the present action to foreclose the lien. Issue was joined on the allegations of his complaint and a trial had, resulting in findings and a judgment denying his right to foreclose the lien. He appeals.

The record presents chiefly questions of fact. It is not important that these be discussed in detail or at length. The first is, to whom was the lumber actually sold. It is the appellant's contention that it was sold to the respondents Heirgood, or, more accurately perhaps, to Kolb and the Heirgoods jointly. He testified that Mr. Heirgood appeared at his place of business sometime in the summer of 1910, looked over his materials, inquired concerning prices, and where good carpenters could be found, saying that he contemplated building a house and desired to get some idea as to its probable cost. That he later appeared with Mr. Kolb and again looked over the materials, stating that Mr. Kolb was going to build the house, and would later furnish him with a statement of the materials required and give him a chance to bid on them. That later the statement was furnished, that he did submit prices, and was given an order by Mr. Kolb for the materials. That he was not informed of the fact that Kolb was building the dwelling under contract, but understood that Kolb had charge of the construction of the building as the agent of the Heirgoods, and that in dealing with Kolb he was dealing with the Heirgoods.

His testimony is directly opposed in all of its material particulars by that of Heirgood, and to the greater extent

by that of Kolb. Their testimony is to the effect that Johnson was informed as to the exact relation between Kolb and Heirgood, and dealt with Kolb with full knowledge of such relation. In this they are supported by the written evidence put into the record by Johnson himself. The written statements of the materials delivered, sent out with each separate wagonload, are all marked as sold to Kolb, with the name of Heirgood thereon as the owner of the building at which the materials were delivered. Without, therefore, further pursuing the inquiry, we think the trial court was justified in finding that the materials were sold and delivered to Kolb as an independent contractor and not as the agent of Heirgood; at least there is no such preponderance of the evidence in favor of the opposite view as to warrant us in reversing the finding.

The statute, Rem. & Bal. Code, § 1133, provides that a person furnishing materials to a contractor to be used in the construction of a building shall, at the time the materials are delivered to the contractor, as a condition precedent to the right of lien, mail or deliver to the owner of the building a duplicate statement of all such materials. This requirement of the statute was not complied with in this instance, but the appellant seeks to escape the penalty usually following such an omission by contending that there was a waiver of the statutory requirements by the respondents, and that they had actual notice of the delivery of the materials.

It appears that as each separate wagonload of material left the appellant's place of business, the driver of the wagon was furnished with duplicate statements of the contents of the load, and was instructed to leave one of such statements with the person to whom the materials were delivered and to have the other signed by such person and returned to the appellant as evidence of such delivery. Among the first of the materials delivered was a load of cement, intended for the foundation of the building. The driver, after unloading

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the load, tendered the statements to Heirgood, who was present at the place where the material was unloaded. Heirgood refused to accept the statement or receipt for the materials, and pointed out to the driver another person, saying, "He is the man to attend to that and not me." This act is thought to constitute a waiver on the part of Heirgood of the right to insist that duplicate statements of the materials furnished should have been mailed to him as a prerequisite to the right of lien. But plainly it is not so. If the act of Heirgood could be said to be the constituting of the particular individual his agent to act for him, the agency could relate only to the particular load, as no other of the very considerable quantity of material that went into the building was receipted for by this particular person. But the conclusive answer is that neither the appellant, the respondents, nor the drivers of the wagons hauling the material regarded these duplicates as notices under the statute. The scheme was the convenient means adopted by the appellant for keeping account of materials sold, and the signature desired was the signature of the person, or the representative of the person, to whom the materials were sold. This is further evidenced by the fact that the appellant received and retained without question numerous receipts signed by Kolb himself, who is concededly not the owner of the property, nor the person pointed out by Heirgood as the proper person to whom to deliver the statements.

But it is said that the respondents had actual notice of the delivery of the materials, and hence further notice to them by way of duplicate statements was not necessary. The record does indeed show that the respondents resided close to the property on which the house was being built, during the entire time the house was in process of construction, and that Mr. Heirgood frequently inspected the materials, and at times caused the superintending architect to reject some that he thought were not of the quality called for in the specifications for the building. But the right of lien is statutory,

and a substantial compliance with its terms is necessary to obtain its benefits; and since the statute makes this one form of notice essential, and places the burden of giving it upon the person asserting the lien, the courts should be slow in saying that some other form of notice will answer the purpose. It should not be so held in the present instance.

There is no error in the record, and the judgment will stand affirmed.

MOUNT, MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 10699. Department Two. February 13, 1913.]

M. W. LEWER, *Respondent*, v. E. M. CORNELIUS, *Appellant*.¹

INTOXICATING LIQUORS—CONTRACTS—VALIDITY—PUBLIC POLICY—AIDING IN EVASION OF LAW. Under Rem. & Bal. Code, § 6282, making it unlawful for a brewing company to pay, advance, or loan or become surety for the payment of a retail liquor license, a promissory note by the retailer, payable to a bank, and delivered to a brewing company, which solicited from the bank a loan thereon to pay the retailer's license fee, is void as against public policy and unenforceable, where the bank had notice of the purpose of the loan and made the same on the security of the brewing company with a view of assisting in the evasion of the statute.

CONTRACTS—VALIDITY—PUBLIC POLICY—ENFORCEMENT—OBJECTIONS HOW RAISED. The courts will refuse to enforce a contract entered into in violation of a statute and against public policy, without regard to the manner in which the illegality is disclosed, and will start an inquiry of its own regardless of the technical accuracy of the pleadings or the admissibility of evidence disclosing the illegality, to the end that neither party be given any aid in illegal proceedings.

STATUTES—TITLES AND SUBJECTS—INTOXICATING LIQUORS. The title to the act of 1909, Rem. & Bal. Code, § 6282, "to prohibit any manufacturer . . . from having any interest . . . in any retail liquor license . . . or to become surety on any liquor dealer's bond . . ." is broad enough to include the provision of the act prohibiting such manufacturer from paying or advancing money or becoming surety for the payment of a retail liquor license.

¹Reported in 129 Pac. 911.

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CONSTITUTIONAL LAW—DUE PROCESS—INTOXICATING LIQUORS—REGULATIONS. Rem. & Bal. Code, § 6282, prohibiting any manufacturer from advancing money to pay or become surety for the payment of any retail liquor license, does not deprive the manufacturers of property without due process of law, regulation of the liquor traffic being within the power of the state.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered April 1, 1912, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action on promissory notes. Reversed.

R. G. Hutchinson, for appellant.

Happy, Cullen, Lee & Hindman (*Sydney A. Cryor*, of counsel), for respondent.

FULLERTON, J.—This is an action brought by the respondent against the appellant to recover upon two promissory notes, alleged to have been made and delivered by the appellant to the Exchange National Bank of Spokane and by the bank indorsed to the respondent after maturity. The appellant, for answer to the complaint, set up facts thought to show that the notes were founded on an illegal consideration. To the answer, a general demurrer was interposed, which the trial judge sustained. The appellant thereupon refused to plead further, and judgment was entered against him according to the prayer of the complaint. The ultimate question therefore is, do the facts set forth in the answer show an illegal consideration for the notes.

The material part of the answer is as follows:

“(1) That the promissory notes referred to in paragraph one of plaintiff’s first and second causes of action, were given for an illegal consideration, and in furtherance of an illegal transaction arising as follows: The Inland Brewing and Malting Company is, and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the state of Washington, and authorized to do business in said state, and in the city of Spokane, is, and was at all of said times, a corporation en-

gaged in the manufacturing and bottling of fermented malt liquors, and was at all of said times engaged in buying, selling and disposing of the same in quantities of five gallons or more in said city of Spokane; that at all of said times, one Charles Theis was, and now is, president of said Inland Brewing and Malting Company, and one William Huntley was at all of said times, and now is, secretary of said brewing company.

“(2) That the Exchange National Bank of Spokane mentioned as payee in the notes referred to in plaintiff's first and second causes of action herein, is, and was at all of said times, a national bank organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business at Spokane, Washington; that said William Huntley heretofore mentioned as secretary of said Inland Brewing and Malting Company is, and was at all of said times, the vice president of said Exchange National Bank, and had full knowledge of all of the transactions hereinafter mentioned between said bank, said brewing company, and this defendant.

“(3) That on or about the 12th day of May, 1911, this defendant was, and ever since has been, engaged in the business of operating a retail liquor store or saloon at No. 8 Howard street in said city of Spokane, for the retailing of spirituous fermented malt and other intoxicating liquors; that the cost of the license for retailing such liquors, under the requirements of Ordinance No.—of the ordinances of said city of Spokane, was, at all time herein mentioned, one thousand dollars; that shortly before his license became due, defendant told said Inland Brewing and Malting Company that he did not have the ready money with which to pay said license; that said brewing company thereupon solicited from said Exchange National Bank, a loan of one thousand dollars, a portion of which is represented by the promissory notes set out in paragraph one of plaintiff's first and second causes of action herein, with which to pay said license; that said loan was made by said bank upon the solicitation of said brewing company; that defendant at no time, nor at all, requested or solicited a loan of said bank of one thousand dollars, or of any other sum whatsoever, or at all; that said bank made said loan at the request and solicitation of said brewing company and knew the purpose for which said loan

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was made, and made the same after being fully advised by said Theis and said Huntley of the use to which the money so loaned, would be put; that said bank allowed its name to be used as payee in said promissory notes, with the view to, and for the purpose of, aiding and assisting said brewing company, and did so aid and assist said brewing company in evading and circumventing the law; that in truth, and in fact, said brewing company paid said license for defendant, contrary to law; that said promissory notes were taken by said bank as a cloak under which to hide the fact that said brewing company had, contrary to law, paid the license of defendant, a retail liquor dealer; that said promissory notes when signed by defendant, were not delivered to said bank but were, by defendant, delivered to said brewing company; that the one thousand dollars, for a portion of which said two promissory notes were, by defendant, signed, was delivered by said bank to said brewing company, and not to defendant; that by reason of having so paid said license, said brewing company sought to, and did acquire, contrary to law, a financial interest in defendant's retail liquor store."

Prior to the hearing on the demurrer, the parties stipulated that the notes were first signed by the appellant and then delivered to the brewing and malting company named in the answer, and by that company in turn delivered to the Exchange National Bank, and by the bank endorsed after maturity to the respondent.

The statute on which the answer is based is found in the Laws of 1909, at page 182 (Rem. & Bal. Code, § 6282), and reads as follows:

"From and after the thirty-first day of December, 1909, it shall be unlawful for any person, persons, firm or corporation engaged in the manufacture, rectifying or bottling of spirituous, fermented malt or other intoxicating liquors or engaged in buying, selling or disposing of the same in quantities or five gallons or more to own all or any part of or to have any interest in the liquor, stock, fixtures or equipment of any kind whatsoever of any retail liquor store or to pay, advance or loan or become surety for the payment for any other person of the license fee required by any state law or city charter or ordinance, or to hire, engage or employ, di-

rectly or indirectly, any person, persons, firm or corporation to manage, conduct, control or operate a place where intoxicating liquors are sold at retail, to wit: in less than five gallons at a time or to sign or become surety on any bond required by law of a retail liquor dealer."

In this court the respondent makes two principal contentions against the sufficiency of the answer; namely, (1) That the facts pleaded therein do not show a violation of the statute; and (2) that the statute is unconstitutional in so far as it has relation to the facts shown in the answer. Noticing the first of these contentions, it is at once apparent that the payee named in the notes is not within the class of persons who are denied the right "to pay, advance or loan or become surety for the payment for any other person of the license fee" required as a condition precedent to engaging in the barter and sale of intoxicating or malt liquors. But while the payee itself could do any or all of these things without violating any of the prohibitions of the statute, it could not with impunity lend its name as a cloak to cover similar transactions on the part of the prohibited persons. It could not make a loan for the purpose of paying a license fee, on the security of a person or corporation engaged in the manufacture of spirituous or malt liquors, nor could it loan in its own name for this purpose the money of the person or corporation so engaged, as to do these things would be such a participation in the illegal acts as to render void any contract or obligation made in connection therewith; and this although it be true, as counsel contend, that the bank could knowingly loan money to the brewing company to be used for paying such a license fee without rendering the contract of loan illegal or unenforcible.

And here it may be well to notice another contention of the respondent. It is claimed that the maker of a note is estopped to deny that the payee thereof is the real party in interest. But conceding this to be a general rule, it has no application to the question suggested here. The court lis-

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tens to this defense not because of any desire to aid the maker of the note—indeed he is usually as culpable as the payee—but listens to it because of the public policy involved; because the parties in entering into the contract have violated the statute. A court will not knowingly aid in the furtherance of an illegal transaction. And in harmony with this principle, it does not concern itself as to the manner in which the illegality of a matter before it is brought to its attention. If such illegality appears in the pleadings of either party, it will not inquire into the technical accuracy of such pleading; if it appears in the statement of witnesses at the trial, it will not inquire into the technical admissibility of such statement as evidence, but will, in either case, start an inquiry of its own, and if it be found that the differences which it is called upon to adjudicate arise out of an illegal transaction it will leave the parties where it found them, to work out their differences as best they may. *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 79 Am. St. 961, 51 L. R. A. 889, and cases there cited; *Baird v. Sheehan*, 38 App. Div. 7, 56 N. Y. Supp. 228; *Howe's Ex'r v. Griffin's Adm'r*, 126 Ky. 373, 103 S. W. 714, 128 Am. St. 296.

Tested by these rules, it is manifest that the court was in error when it refused to inquire into the legality of the transaction giving rise to the notes in suit. In the answer it is alleged that the brewing company named is a corporation engaged in manufacturing and bottling of fermented malt liquor, and in selling the same in quantities of five gallons and more; that the appellant is engaged in conducting a retail liquor store; that the brewing company solicited of the payee named in the note a loan of one thousand dollars to pay the license fee required of the appellant by the city of Spokane; that the payee knew the purpose for which the loan was desired; that it allowed its name to be used as payee of the notes "with the view to, and for the purpose of, aiding

and assisting said brewing company, and did so aid and assist said brewing company in evading and circumventing the law; that said promissory notes were taken by said bank as a cloak under which to hide the fact that said brewing company had, contrary to law, paid the license fee of defendant"; and that the notes when signed were not delivered to the bank by the appellant, but were delivered to the brewing company, who delivered them to the bank.

It may be that the answer is inartificially drawn, and it may be that conclusions are stated therein when a detail of facts would be more appropriate, but clearly it states enough to show a reasonable probability that the notes were signed by the maker and taken by the payee in the furtherance of an illegal transaction. The court, therefore, before entering judgment, should have entered upon an inquiry as to the facts concerning the making and delivery of the notes, and if it found the transaction illegal and that the payee participated therein, should have refused to aid in enforcing the collection of the notes.

The title of the act is as follows:

"An act to prohibit any manufacturer of or wholesale dealer in intoxicating liquor from owning, operating or having any financial interest in any saloon or other retail liquor store or in any retail liquor license in the state of Washington or to become surety on any liquor dealer's bond and providing penalties for violation thereof."

The act, it will be remembered, makes it an offense for a person or corporation engaged in the manufacture, rectifying or the bottling of spirituous, fermented, malt or other intoxicating liquors "to pay, advance or loan or become surety for the payment for any other person of the license fee required by any state law, city charter or ordinance" for the sale of intoxicating or malt liquors in less than five gallons at a time. It is the contention of the respondent that the answer, if it sets forth a violation of the statute at all, sets forth a violation of that portion of the statute which

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we have quoted, and that such portion is not within the title of the act. It is argued that a person reading the title of the act would not be apprised of the fact that the act prohibits a brewery from loaning money to a retail liquor dealer for the purpose of paying his license fee, or from becoming his surety to another who makes a loan for that purpose, and inasmuch as the title is thus deficient, this particular part of the statute is not enforceable because not within the title. But we have many times held that it is not required that everything in the body of the act be pointed out in the title, as this would require the title to be an index to the body of the act, or the body of the act to be a mere repetition of the title. But that it is sufficient if the matters contained in the body of the act are fairly embraced therein. *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893; *Shortall v. Puget Sound Bridge & Dredging Co.*, 45 Wash. 290, 88 Pac. 212, 122 Am. St. 899; *State v. Jones*, 66 Wash. 229, 119 Pac. 384. Under the rules as announced in these cases, we think the title sufficient. We think the words in the title, namely, "to prohibit any manufacturer or wholesale dealer in intoxicating liquors from . . . having any interest in any saloon or other retail liquor store, or in any retail liquor license," are broad enough to include a clause in the body of the act prohibiting any manufacturer of, or wholesale dealer in, intoxicating liquors from advancing money to pay, or becoming surety for the payment of, a retail dealer's liquor license.

A second ground on which the act is said to be unconstitutional is that it deprives manufacturers of, and wholesale dealers in, intoxicating liquors of their property without due process of law, and hence is in violation of the Federal as well as the state constitution. But it has seemed to us that

this question is scarcely any longer debatable. The act is but another form of regulation of the traffic in intoxicating liquors, and to regulate the sale and use of intoxicating liquors is now among the universally recognized powers of the state governments.

The judgment is reversed, and the cause remanded for a new trial.

MOUNT, MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 10810. Department Two. February 13, 1913.]

J. W. KING, *Respondent*, v. WEST COAST GROCERY COMPANY,
Appellant.¹

CORPORATIONS—CONTRACTS — EXECUTION — VALIDITY — EVIDENCE—SUFFICIENCY. There is a *prima facie* valid execution of a lease by a corporation to its president, where it was signed by the president and secretary and also the other trustees, and attested by the corporate seal, and there was evidence that it was authorized by the trustees, although no record thereof was made.

SAME. The assignment of a contract by a corporation is sufficiently shown where it appears that it was signed by the secretary, who was authorized to make it, and that it and a lease were parts of the same transaction, and there was *prima facie* evidence of the valid execution of the lease; especially where the lease and contract were acquiesced in by the corporation, and hence valid as between the parties.

ASSIGNMENTS—VALIDITY. An assignment of a contract valid as between the parties is sufficient to pass the title to the property, as against the other party to the contract.

ASSIGNMENTS—CONTRACTS ASSIGNABLE. A contract whereby a fruit preserving company sold to a wholesaler for future delivery a specified number of cases of jelly and jam subject to approval, and guaranteed under the pure food laws, is assignable, where it specified no particular manufacturer, brand or label.

ESTOPPEL—BY CONDUCT—VALIDITY OF ASSIGNMENT. The acceptance, from an assignee, of goods sold, with knowledge that the contract had been assigned, estops the vendee from questioning the assignment.

¹Reported in 129 Pac. 1081.

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SET-OFF AND COUNTERCLAIM—AGAINST ASSIGNED CLAIMS—PERSONS ENTITLED—STATUTES—CONSTRUCTION. A claim against an assignor cannot be asserted by way of counterclaim against the assignee of an executory contract to sell goods for future delivery, on which nothing was due and which the assignee took while in the executory stage; in view of Rem. & Bal. Code, § 191, providing that any debtor may plead a counterclaim against an assigned debt, if held by him against the original owner, and Id., § 266, authorizing a set-off of any demand against the plaintiff which existed and belonged to defendant at the time of the suit, and against any assigned demand if it existed at the time of the assignment; since these statutes are *in pari materia*, and construed together do not authorize a set-off against the assignee of an executory contract, when both claims are not matured, and which could not have been asserted against the assignor prior to the assignment.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered May 18, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Hayden & Langhorne, for appellant.

James R. Chambers, for respondent.

ELLIS, J.—This is an action to recover the purchase price of certain jellies and jams sold and delivered to the defendant, West Coast Grocery Company. The sale was by a written contract between the defendant and Vashon Island Preserving Company, a corporation, dated May 17, 1910, which contract it is claimed was sold and assigned to the plaintiff King, on June 11, 1910. It is admitted by both parties to this action that, at about that time, the officers and trustees of the Vashon Island Preserving Company leased its plant to the plaintiff, with the understanding that all of its existing contracts should be assigned to him, and that the lease and the assignment of the contract here in question were parts of one and the same transaction. The evidence shows without contradiction, that thereafter the plaintiff personally and at his own cost manufactured the goods and shipped

them to the defendant; that the cases and jars were marked "Vashon Island Preserving Company, J. W. King, Lessee," and that the invoices sent to the defendant were in the name of J. W. King, lessee. It is admitted that the defendant accepted and retained the goods, and there is no claim that they were not of the kind and quality contracted for, or that they were not of the full value agreed to be paid for them.

The defendant admitted the execution of the contract, admitted the receipt and retention of the goods, but denied the assignment of the contract, and interposed as a set-off or counterclaim damages claimed against the Vashon Island Preserving Company, on account of its breach of warranty in furnishing inferior goods to the defendant under a contract of the year before. The evidence shows that the goods sold under this last-mentioned contract had been received and paid for by the defendant some time prior to the making of the contract of May 17, 1910. The cause was tried to the court without a jury, and judgment was rendered in plaintiff's favor for \$818.59. The counterclaim was refused. The defendant prosecuted this appeal.

The court, in order to avoid a retrial in the event of this court holding that the counterclaim should have been allowed, took evidence on the defendant's claim and made a finding thereon that the goods furnished by the Vashon Island Preserving Company under the contract of the year before were defective and damaged to the value of \$162; that the plaintiff, on and after June 7, 1910, knew that defendant claimed the goods furnished under this first contract were unsalable, but had no knowledge of the extent of such claim of damage; that the defendant, at the time of its reception of the goods delivered to it by the plaintiff under the assignment of the second contract, well knew that they belonged to the plaintiff, but prior thereto had no knowledge of the assignment of the contract.

(1) The appellant first contends that neither the lease of the preserving plant nor the assignment of the contract

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of May 17, 1910, was validly executed by the Vashon Island Preserving Company to the respondent. It is urged that both of these acts were void because there was no formal resolution of the board of trustees of the corporation authorizing either of them. There was no direct evidence that any formal resolution was ever passed, but both the president and secretary testified that both the lease and the assignment were authorized by the trustees. There was, however, direct evidence that no record was ever made of any such resolution, if any was ever passed. The company had three trustees, of whom the respondent was one. He was also president of the company. The lease, which is in evidence, was executed in the name of Vashon Island Preserving Company, by the respondent as its president and also as trustee, and by its secretary, and was attested by the corporate seal. It was also signed by the other two trustees. It was acknowledged by the president and secretary in the statutory form for corporate acknowledgments, the certificate reciting that both officers stated under oath "that they were authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation." The lease itself recited that the corporation had caused its execution. In the absence of any evidence to the contrary, the evidence adduced must be held sufficient to establish *prima facie* the validity of the lease. *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1, 35 Pac. 402; *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32; 4 Thompson, Corporations (1st ed.), § 5029.

The assignment of the contract was made by the secretary, who testified that he was authorized to make it. It is admitted that the lease and the assignment were parts of one and the same transaction. The *prima facie* establishment of the authorization of the lease was, therefore, some evidence that the transfer of the contract was also authorized. Moreover, it was shown that the trustees had at all times full knowledge of the transaction, knew that the contract was being performed by the respondent, and on two or three oc-

casions thereafter held regular meetings and did not in any manner question or disaffirm the transaction, but knowingly received its benefits in the rental paid by the respondent. These things were ample to prevent the Vashon Island Preserving Company from ever in any way questioning the authorization of either assignment or lease. *Dexter Horton & Co. v. Long*, 2 Wash. 435, 27 Pac. 271, 26 Am. St. 867; *Carrigan v. Port Crescent Imp. Co.*, 6 Wash. 590, 34 Pac. 148; *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 Pac. 380; *Roberts v. Washington Nat. Bank*, 11 Wash. 550, 40 Pac. 225; *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247; *Rowland v. Carroll Loan & Inv. Co.*, 44 Wash. 413, 87 Pac. 482; *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 162, 89 Pac. 495; *Russell v. Schade Brewing Co.*, 49 Wash. 362, 95 Pac. 327; *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125; *National Bank of Commerce v. Puget Sound Biscuit Co.*, 61 Wash. 192, 112 Pac. 265; *Starwich v. Washington Cut Glass Co.*, 64 Wash. 42, 116 Pac. 459; *Sesnon v. Lindberg*, 66 Wash. 1, 118 Pac. 900. While these decisions, as pointed out by the appellant, rest largely upon the principle of estoppel as between the immediate parties to the transaction, still, if the contract here in question was assignable at all, evidence of any assignment sufficient to pass the title as between the parties to the assignment is all that can be required. It is merely a matter of proving title. *Kull v. Thompson*, 38 Mich. 685.

(2) But the appellant contends that the contract was not assignable without its consent. There can be no question as to the general rule that, in the absence of prohibition by statute or stipulation by contract, rights arising out of executory contracts are assignable whenever they would survive to the personal representative of the assignor. 2 Am. & Eng. Ency. Law (2d ed.), 1017, 1035; *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. 948; *Conaway v. Co-Operative Homebuilders*, 65 Wash.

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39, 117 Pac. 716. The exceptions to this general rule are also well established. It is often broadly stated, in varying forms of expression, that, if the rights are coupled with liabilities or if they involve a relation of personal confidence or a personal service, they cannot be assigned. 4 Cyc. 22. The difficulty is not one of mere definition. It lies in the application of these general principles to the given case. Strictly speaking, almost every right arising under an executory contract has its corresponding liability. To give to the language of the first branch of the exception an absolute sense would be to declare every executory contract nonassignable. As applied to sales of personal property for future delivery, the liability, coupled with the right, must be dependent upon some future dealing with the property sold as between the parties, in order to render the contract of sale nonassignable.

“When the contract is executory in its nature, and an assignee or personal representative can fairly and sufficiently execute all that the original contractor could have done, the assignee or representative may do so and have the benefit of the contract.” *Devlin v. Mayor etc. of New York*, 63 N. Y 8, 17.

See, also, *In re Niagara Radiator Co.*, 164 Fed. 102.

The question in each case must turn upon the intention of the parties. In order to determine whether a given contract falls within either branch of the exception, it is necessary to consider the nature and purpose of the contract and its terms and provisions. The contract here in question was as follows:

“Seattle, May 17, 1910.

“Sold to West Coast Grocery Company, Tacoma, Wash., for account and subject to approval of Vashon Island Preserving Company,

350 Cases No. 3 Jelly, 4 doz. to case, per dozen90c

150 Cases No. 3 Jam, 4 doz. to case, per dozen90c

Less 15% discount, Pack of 1910, October delivery.

Terms: F. O. B. Tacoma, less 2% cash discount 10 days from date of invoice. The sellers guarantee all goods sold

under this contract to comply with the pure food law approved by congress June 30th, 1906.

“Accepted, West Coast Grocery Co., Buyer.

“By, S. A. Nourse, Treas.

Bennington Burton, Broker.

Vashon Island Preserving Co.,

Seller.

“By J. W. King.”

This is simply a sale of personal property for future delivery. There is no undertaking that the goods shall be manufactured by any particular person or corporation. The contract involves nothing of a personal nature, nothing from which it can be implied that performance by the preserving company alone was the inducement or of the essence of the contract, nothing involving a personal confidence. No particular brand or label or trade-mark is specified, no particular process of manufacture imposed, no future dealings of any kind with the property sold, as between the parties, contemplated. It is not a sale of fruits with an agreement to manufacture. It is a sale of a completed product for future delivery. The crucial point is that the appellant was required to pay no money until the goods were furnished of the kind and quality required by the contract. Such a contract, in the absence of stipulation to the contrary, is assignable by either party.

A contract in which one party agreed to sell, and the other to buy, all sound grapes containing a certain percentage of saccharine matter, to be grown from certain vines for a period of ten years, was held by the supreme court of California, after a careful analysis of the authorities, assignable by the seller, upon the same principles herein announced. *La Rue v. Groezinger*, 84 Cal. 281, 24 Pac. 42, 18 Am. St. 179.

A contract for the drilling of an oil well has also been held by the supreme court of Pennsylvania assignable by the contractor. The court said:

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"The personal performance of the work by the legal plaintiff could not have been contemplated by the parties at the time the contract was made. The work of necessity required the labor and attention of a number of men, and it does not appear that because of his knowledge, experience or pecuniary ability, or for any other reason, Galey was especially fitted to carry it on. There is nothing of a personal nature about it, and its personal performance by him was not the inducement nor of the essence of the contract. The contract was assigned to Smith Bros., the use plaintiffs, and the work under it was done by them, with the knowledge of the defendant from the beginning." *Galey v. Mallen*, 172 Pa. St. 443, 33 Atl. 560.

The same principles are exemplified in the following decisions: *Janvey v. Loketz*, 122 App. Div. 411, 106 N. Y. Supp. 690; *Anse La Butte Oil & Mineral Co. v. Babb*, 122 La. 415, 47 South. 754; *Poling v. Condon-Lane Boom & Lum. Co.*, 55 W. Va. 529, 47 S. E. 279.

It is useless to review the vast number of authorities cited by the appellant in this connection, since the principles here involved are not questioned, and we conceive that a discriminating application of these principles to the contract before us demonstrates its assignability. Moreover, the goods were accepted by the appellant as meeting the contract. They were at least retained by it with knowledge of the assignment. While the evidence was conflicting as to whether or not the respondent notified the appellant of the assignment shortly after it was made, it is not denied that the invoices gave such notice when the goods were delivered. The court would have been justified in finding that the appellant was estopped to question the assignment.

(3) The third contention is that, even conceding that the contract was legally assignable and was validly assigned, still the appellant's claim against the preserving company was a valid set-off or counterclaim against the assignee, King. The trial court held that the appellant could not set off its claim against the amount due respondent on the assigned

contract, because that contract was, at the time of the assignment, an executory contract upon which nothing was then due, and hence the appellant's claim was not such a demand as might have been set off against the respondent's assignor while the contract belonged to it. The appellant contends that this was error. It is urged that the case of *Boston Tow Boat Co. v. Seson Co.*, 64 Wash. 375, 116 Pac. 1083, is decisive of this question. In that case the defendants, as ship lighters, had, prior to September, 1907, agreed with the charterers of a vessel to collect and turn over all freight charges, less compensation, for lighterage. We held that the defendants might set off a prior indebtedness to them from the charterers for failure to deliver coal and grain shipped in their care, in an action for freights collected by the defendants, brought by the owners of the vessel upon abandonment of the vessel by the charterers in September, 1907, the charterers agreeing as a part of the agreement of abandonment to collect and hold in trust for the owners the proceeds of the voyage then about to begin. The lower court allowed the set-off, on the express ground that the defendants had no notice of this agreement, and that, as between the defendants on the one hand and the plaintiff and the charterers on the other, the money collected by the defendants and by them retained was the interest of an undisclosed principal. Moreover, the actual assignment to the plaintiff of the claim for this freight was, as the lower court in effect found, made after the freight was collected. This finding does not appear in the opinion, but that it was made is conceded in the briefs which we have examined, and our decision states that the facts found by the court were justified by the testimony.

The actual question here involved, though raised in the briefs, was not discussed in the opinion. Whether a matured claim against the assignor of an immature claim may be set off in an action by the assignee brought after the assigned claim has matured, has never been decided by this court.

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The question is one of statutory construction. Section 191, Rem. & Bal. Code, gives to the assignee of any judgment, bond, specialty, book account, or other chose in action the right to sue thereon in his own name, with a proviso "that any debtor may plead in defense a counterclaim or an off-set if held by him against the original owner, against the debt assigned," save as against negotiable paper assigned before due. This section does not attempt to define the time within which the right of set-off may be asserted, but was manifestly intended only to preserve the right of set-off. There is, however, force in the view that the words "against the *debt* assigned" mean against a claim matured at the time of the assignment. The time within which a set-off or counterclaim may be asserted is specifically defined by two subsequent sections. Section 265 defines a counterclaim generally, and does not specifically refer to assigned claims, and must be held to apply only to claims as between the original owners. This is shown by the next section, 266, which expressly fixes the time when the set-off or demand may be allowed as against an assigned claim. It is as follows:

"The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him."

These sections are statutes *in pari materia*, and were all passed by the territorial legislature of 1854, and were re-

tained in the code of 1881. They are not necessarily in conflict, and hence, under the rules of construction, they must be construed together so as to effectuate the purpose of all. Section 266 is capable of no other construction than that a set-off can only be allowed as against an assigned demand, when it could have been asserted against such demand at the time of the assignment and as against the original owner. Obviously, there can be no set-off against an executory contract while it remains in the executory stage. Performance only could ripen such a contract into a valid demand. There was, at the time of the assignment, no debt or demand against which the set-off could then be made. We are constrained to hold that the claim of the appellant was not a proper subject of set-off against the respondent's demand arising on the contract subsequent to the assignment, because it was not such as against the respondent's assignor while it held the contract in the executory stage. There was never a time while the contract was held by the Vashon Island Preserving Company when the appellant's claim could have been set off against it. The assignment, therefore, defeated the right to set-off as against the assignee King. The construction which we place upon these three sections of the statute is the only one which harmonizes them and yet gives a legitimate scope and accords a meaning and purpose to each. Any other construction would effect a repeal of § 266 by implication, when no such implication is necessary. This is never permissible. So construing the statute, the authorities are overwhelming to the effect that a claim against the assignor cannot be asserted against the assignee of an executory contract who took it while in the executory stage, in the absence of some showing of insolvency of the assignor. In this case there was no such showing.

“When two opposing debts exist in a perfect condition at the same time, either party may insist upon a set-off. If, therefore, the holder of such a claim already due and payable assign the same, and the debtor at the time of this transfer

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holds a similar claim against the assignor, which is also then due and payable, he may set off his debt against the demand in the hands of the assignee. If, however, the assignment is made before the opposing demand becomes mature, and the latter does not thus become actually due and payable until after the transfer, the debtor's right of set-off is destroyed by the mere fact of the assignment, and no notice thereof to him is necessary to produce that effect." Pomeroy, Code Remedies (3d ed.), § 163.

See, also, *Bradley v. Thompson Smith's Sons*, 98 Mich. 449, 57 N. W. 576, 39 Am. St. 565, 23 L. R. A. 305; *Koegel v. Michigan Trust Co.*, 117 Mich. 542, 76 N. W. 74; *Henderson v. Michigan Trust Co.*, 123 Mich. 688, 82 N. W. 510; *Kull v. Thompson*, *supra*; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Richards v. La Tourette*, 6 N. Y. Supp. 937; *Beckwith v. Union Bank*, 9 N. Y. 211; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Jordan v. National Shoe and Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 319; *Greene v. Darling*, Fed. Case, No. 5765; *Stitt v. Horton*, 165 Ind. 555, 76 N. E. 241; *Campbell v. Equitable Life Assur. Soc.*, 130 Fed. 786. No fraud in the assignment was established. The respondent took an executory contract, performed it at his own expense, and is entitled to his pay from the appellant, who accepted the goods as meeting the contract.

The judgment is affirmed.

CROW, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10914. *En Banc*. February 14, 1913.]

THE STATE OF WASHINGTON, *on the Relation of J. H.
McCallum et al., Plaintiff*, v. THE SUPERIOR COURT
FOR COWLITZ COUNTY *et al., Respondents*.¹

INTOXICATING LIQUORS—LOCAL OPTION — ELECTIONS — CONTESTS—REVIEW—JURISDICTION—CERTIORARI. In view of Rem. & Bal. Code, § 6313, providing for contesting the validity of local option elections and conferring upon the superior court final jurisdiction to determine the merits, a judgment of the superior court dismissing an action to declare a local option election null and void cannot be reviewed on the merits in the supreme court by writ of certiorari.

SAME—CONTEST OF ELECTION—COURTS—JURISDICTION. As a local option election affects the public and not private interests, and determination of contests belongs to the political rather than the judicial branch of the government, the legislature has the power to confer final jurisdiction of election contests upon the superior court, notwithstanding the constitutional provision vesting in the supreme court the power to issue writs of review.

Application for a writ of certiorari to review a judgment of the superior court for Cowlitz county, McKenney, J., entered December 7, 1912, dismissing an action to nullify a local option election. Denied.

Gus L. Thacker and *Hayden & Langhorne*, for relators, contended, among other things, that the legislature has not the power to infringe upon the constitutional provision vesting in the supreme court the power to issue writs of review. *Rash v. Allen* (Del.), 76 Atl. 370; *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491, 69 Pac. 1107, 92 Am. St. 907; *Independence Party Nomination*, 208 Pa. St. 108, 57 Atl. 344; *In re Foy's Election*, 228 Pa. 14, 76 Atl. 713; *Dinsmore v. Mayor etc. of Manchester* (N. H.), 81 Atl. 533. Certiorari will issue where there is no right to appeal or where the proceeding is unknown to the common law and of a summary character and of judicial or *quasi* judicial nature. 6

¹Reported in 129 Pac. 900.

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Cyc. 789; 15 Cyc. 439. *In re Foy's Election* and *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, *supra*; *Commonwealth ex rel. Whitman v. Ramsay*, 166 Pa. St. 642, 31 Atl. 345; *State ex rel. Board of Com'rs of St. Louis County v. Dunn*, 86 Minn. 301, 90 N. W. 772; *State ex rel. Heller v. Lawler*, 103 Wis. 460, 79 N. W. 777; *State ex rel. Wood County v. Dodge County*, 56 Wis. 79, 13 N. W. 680; *State ex rel. Moreland v. Whitford*, 54 Wis. 150, 11 N. W. 424. The filing of a petition within the time limited is a condition precedent to the holding of a valid election. 23 Cyc. 95, 96; *In re Krieger*, 59 App. Div. 346, 69 N. Y. Supp. 851. The failure of the officers to place upon the ballot the proposition required by statute is fatal to the election. 15 Cyc. 349; 1 Woollen and Thornton, *Law of Intoxicating Liquors*, § 534; *People ex rel. Beasley v. Town of Sausalito*, 106 Cal. 500, 39 Pac. 937; *Williams v. Shoudy*, 12 Wash. 362, 41 Pac. 169; *People ex rel. Caffrey v. Mosso*, 30 Misc. Rep. 164, 63 N. Y. Supp. 588.

O'Neil & Spaulding and *Percy P. Burch*, for respondents.

MORRIS, J.—Writ of certiorari to review the judgment of the lower court in an election contest, involving the validity of an election in the city of Castle Rock, to determine whether said city should license the sale of intoxicating liquors. The following facts will be sufficient for a proper understanding of the question submitted for our determination. On November 5, 1912, a local option election was held at Castle Rock, the result of which was in favor of no-license. On November 21, 1912, relators commenced a proceeding in the lower court, alleging various irregularities under which they charged the election was illegal, and praying the lower court to restrain the city clerk from entering and publishing the result of the election, and for a decree declaring the election to be null and void. In this proceeding an answer was filed, putting the allegations of the petition in issue, and in due time a hearing was had in the lower court, when, after a full

hearing upon the merits of the controversy as presented by the petition and answer, the lower court denied the prayer of the petition and dismissed the action.

Thereupon relators came to this court and sued out this writ, under which they seek to have us review the determination of the lower court upon the merits.

Respondents appeared upon the return day and moved to quash the writ and dismiss the proceedings here, upon the ground that no jurisdiction is vested in this court to review the judgment of the lower court upon the merits. This motion must be granted. Section 6313, Rem. & Bal. Code, which is § 22 of the local option law of 1909, provides for contesting the validity of local option elections, confers jurisdiction over such election contests in the superior court for the proper county, and further provides that, "the said court shall have final jurisdiction to hear and determine the merits of such cases." Answering this contention, relators assert that, inasmuch as under our constitution this court is vested with the power to issue writs of review to the complete exercise of its appellate and revisory jurisdiction, the right of review is constitutional and not statutory, and a jurisdiction which is constitutional cannot be taken away by statute. In discussing this question, we confine ourselves to the character of the cases involved in the local option law, and do not mean to hereby express any opinion as to general suits at law or actions in equity involving common law rights.

Whatever may be said as to the right of the legislature to limit the jurisdiction of this court in actions involving property rights or personal liberty where no appeal is given, no such question is presented under the facts in this case. Nor does it, in our opinion, fall within that rule announced by some courts that writs of error will lie from appellate to inferior courts for the purpose of reviewing their final determination in all cases involving property rights or personal liberty where no appeal is given, and that this right exists, independently of any statutory or constitutional provisions, by

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force of the common law, in all cases in which the jurisdiction of such inferior court is exercised according to the course of the common law. The questions here involved, and to which the act in question is devoted, are public rather than private rights, and determine the manner in which the public will shall be finally ascertained, in questions purely of a public nature and not involving an attempt to determine property rights or restrain personal liberty. The determination of these questions is one of undoubted legislative power, and belongs to the political rather than the judicial branch of state government. It has, we think, been universally held that an election contest, such as this proceeding was, as brought in the lower court, is not an ordinary adversary proceeding. *Minor v. Kidder*, 43 Cal. 229. The public is concerned, and it is the public interests that are to be determined, and hence the rule has become established that elections are beyond the control of the judicial power, and that the determination of election contests is a judicial function only to the extent authorized by statute. These rules are so well established no authority will be required to sustain them. Hence, we find numerous cases holding that, where the legislature had committed the final decision of the removal of county seats or questions of a similar nature to public officials or trial courts, the appellate court was thereby deprived of the right to review such decision. *Coon v. Mason County*, 22 Ill. 666; *Moore v. Mayfield*, 47 Ill. 167; *Loomis v. Hodson*, 224 Ill. 147, 79 N. E. 590; *Heffner v. Board of County Com'rs*, 16 Wash. 273, 47 Pac. 430.

This, of course, does not mean that, under constitutional authority such as is conferred upon this court in the issuance of its writs to inferior tribunals, appellate courts may not issue writs of review to determine whether such tribunal is exercising its power according to law, or is acting within or without its jurisdiction. We have repeatedly issued such writs in proceedings under this same law where the question involved the sufficiency of the petition, or other like matter,

affecting the jurisdiction of the lower court, such as in, *State ex rel. Quillen v. Superior Court*, 70 Wash. 343, 126 Pac. 899; *State ex rel. Griffin v. Superior Court*, 70 Wash. 545, 127 Pac. 120; *State ex rel. Czerny v. Superior Court*, 70 Wash. 592, 127 Pac. 207; *State ex rel. Forgues v. Superior Court*, 70 Wash. 670, 127 Pac. 318. In none of these cases, however, were we called upon to exercise a revisory jurisdiction in the nature of an appeal from the determination of the lower court upon the merits of the controversy. The *Griffin* case submitted the question whether a city election was the "last general election" within the meaning of the law, as determining the number of required signatures to a petition calling an election. The other cases involved the sufficiency of the petition under which the jurisdiction of the lower court was invoked. It might be added that in none of them was any question raised as to our full and complete jurisdiction.

The cases cited by relators, and under which their counsel strenuously contend for the exercise of our jurisdiction, are, it seems to us, when properly read, authority against the assumption of such jurisdiction. In *Independence Party Nomination*, 208 Pa. 108, 57 Atl. 344, it is said, in a case involving the right of the Independence party to a separate column of nominations on the official ballot:

"The case having been brought to this court by certiorari, the first question is our jurisdiction. The proceeding being entirely statutory and without appeal, we cannot review the findings of fact or the merits of the case; but, under the general supervisory powers of the court on certiorari we are entitled to inspect the whole record with regard to regularity and propriety of the proceedings, to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion;"

citing *In re Pollard's Petition*, 127 Pa. St. 507, 17 Atl. 1087, involving the granting of wholesale licenses for the sale of liquors where such matters were specially committed to the court of quarter sessions, and where it was said:

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"Upon the writ of certiorari we may review their proceedings so far as to see whether they have kept within the limits of the powers thus conferred, and have exercised them in conformity with law."

These cases are authority for our assumption of jurisdiction in the four cases involving this law where we have accepted jurisdiction, but they hardly go as far as to say that, because jurisdiction is vested in appellate courts by the constitution of the state to issue writs in aid of appellate or revisory jurisdiction, in cases involving no private rights, which are purely statutory in their nature, with the denial of the right of appeal, the appellate court may accept jurisdiction under its revisory writ, and make such writ a medium for a review of the merits of a controversy, presenting no constitutional or jurisdictional questions.

Another case relied upon by relators is *Rash v. Allen*, 1 Boyce (Del.) 444, 76 Atl. 370, an election case involving the rights of the parties to a seat in a city council. The act construed provided that the decision of the city council in such cases should be "final and conclusive." A writ of certiorari was sued out, under which it was sought to test the constitutionality of the law vesting the city council with sole jurisdiction and the validity of its judgment, because the record disclosed that, in hearing and determining the case, the council did not proceed in the manner prescribed by law. The right to the writ being questioned, it was held that, since the power to issue the writ was conferred by the constitution, such right could not be taken away by statute; a rule which will be readily subscribed to. But that the court intended thereby to assert that, because of its constitutional authority in the exercise of its writ of certiorari, it assumed full power of reviewing the judgment below on the merits, as though no question had been suggested as to its power to so review upon an appeal, can hardly be claimed from the language of the decision, for it is said, after reviewing *State v. Wilmington City Council*, 3 Har. (Del.) 294, where mandamus had issued com-

manding the city council to admit one John Hogany to the office of city treasurer, and it was held that the right to issue writs of mandamus could not be taken away, "but by express exclusive words:"

"We cannot believe that in the case above mentioned the court meant to declare that the constitutional power to issue a writ of certiorari for the purpose of determining whether the city council had jurisdiction of a contested election case could be taken away by statute, no matter how 'express and exclusive' the words might be. If the court had in mind the constitutional authority vested therein, they must have meant 'express exclusive words' of as high authority as the power given, to wit, of the constitution. . . . What did the Legislature mean by the statutory provision that the decision of the city council should be final and conclusive? Manifestly it meant that such decision should be final and conclusive so far as the merits of the case are concerned; that is, as to the question the council was to determine—the election that might be contested. It could not have meant, or intended, that the proceedings of the council could not be reviewed by the appellate tribunal for the purpose, or to the extent, of ascertaining whether the council had jurisdiction of the cause, had exceeded its jurisdiction, or had not exercised the same according to law. To hold otherwise would be to make the city council superior to the constitution of the state, and to vest it with powers greater than any court of limited jurisdiction, or any inferior tribunal, in this state has ever possessed. It would enable the council to hear and determine an election case without notice of any kind, without due process of law, without jurisdiction, and indeed in absolute disregard of the rights of the contestee, constitutional or otherwise. Such arbitrary and unlimited power would be not only dangerous, but it is inconceivable and impossible under our system of government. But the words 'final and conclusive' in the statute, have some meaning. What is it? It is simply this: That the action and decision of the council shall not be reviewable so far as the merits are concerned. It did not mean that it might not be reviewed to the extent of ascertaining whether the council had jurisdiction, had acted in excess of its jurisdiction, or exercised the same contrary to law. This we hold to be the law, and our conclusion is amply

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supported by authority as well as reason. 4 Ency. Pl. and Pr. 12, 73; *Commissioners v. Thompson*, 15 Ala. 133 and 18 Ala. 694; *Peters v. Peters*, 8 Cush. (62 Mass.) 537; *Cardiffe's Case*, 1 Salk. 146; *Niblow v. Post*, 25 Wend. 280, 15 Cyc. 395-6-7."

Thus it will be seen that the rule there announced is in harmony with our prior assumption of jurisdiction in cases under the local option law. We have assumed jurisdiction for the purpose of ascertaining whether the lower court had acted within its jurisdiction or exercised the same contrary to law. We decline, as here, to accept jurisdiction where no question is raised involving the jurisdiction of the court below, and the only thing required of us is to review the merits of the controversy as determined by the lower court acting under a conceded jurisdiction. We do not feel called upon to say more. To accept jurisdiction in this case is to read out of the law the provision that the superior court should "have final jurisdiction to hear and determine the merits of such cases," a provision within the power of the legislature to include in granting a statutory right of action and naming the tribunal that should exercise jurisdiction over that right of action, in a case involving only a political and not a private right.

The motion to quash is granted.

CROW, C. J., PARKER, MOUNT, MAIN, FULLERTON, and ELLIS, JJ., concur.

GOSE, J., concurs in the result.

[No. 10808. Department Two. February 18, 1913.]

PAUL ELANIUS, *Respondent*, v. HENRY ROTHSCHILD *et al.*,
Appellants.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—NOTICE OF DANGER. A longshoreman did not, as a matter of law, assume the risks in working near an improvised conveyor chute loading flour, which he had assisted in substituting for a regular chute because of a lumber pile requiring a change, where there was nothing to indicate the faulty construction of the substituted chute, or to give notice that because of failure to fasten it at the lower end, it would gradually work back and cause the accident, the foreman who directed the work not apprehending any danger.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 10, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a longshoreman engaged in loading a vessel. Affirmed.

Trumbull & Trumbull, for appellants.

Johnston & McMenamin, for respondent.

MORRIS, J.—Respondent was injured while acting as one of a gang of longshoremen, engaged in loading a steamship with flour. He recovered judgment, and upon this appeal we are asked to hold that the judgment should be reversed because respondent should be held in law to have assumed the risk of his injury. The material facts are these: Upon the deck of the steamer, and opposite the hatchway through which the flour passed to the lower decks, was a consignment of lumber so placed that it prevented the use of the conveyor chute ordinarily used, on account of the distance between the end of the conveyor and the lumber pile being too short. These conveyor chutes are provided with wide ends, extending beyond the framework of the conveyor, and gradually narrowing to the width of the chute, the purpose of these

¹Reported in 129 Pac. 1091.

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wide ends being to avoid the danger of contact with the endless belt and cleats running on the conveyor.

Finding that, because of the situation of the lumber, the ordinary conveyor chute could not be used, respondent was directed by the foreman to substitute a conveyor chute not provided with widened ends, and to saw off one end of it so as to fit the required distance between the conveyor and the hatchway. One end of this substituted chute was then lashed to the conveyor with ropes, so that it hung a few inches below the conveyor, and the other end brought to the chute leading to the lower deck, without fastening the two chutes together or connecting them in any way so as to prevent the substituted chute from moving when in use. Respondent stationed himself on one side of this substituted chute to assist the flour sacks in passing through it to the hatchway. It was quite dark, so that respondent could not observe any gradual movement of the substituted chute in slowly working back until in about forty-five minutes after its use the end lashed to the conveyor came in contact with the cleats on the conveyor belt, which would have been impossible had it been provided with the wide ends of the regular chute ordinarily used. When the chute came in contact with the cleats, it upset, striking respondent in the face and causing the injury complained of. It is contended that the danger was an obvious one; that respondent was sufficiently experienced to understand it, and that because he assisted in preparing the substituted chute for use, he cannot recover.

We cannot comprehend how we can say that, under all these circumstances, the questions here submitted were not of fact for the jury rather than of law for the court. The danger was not so open and apparent that respondent must be said in law to have assumed it. There was nothing to indicate the faulty construction of this substituted chute, or to apprise respondent that, because of the failure to fasten it at the lower end, it would gradually work back towards

the conveyor and eventually come in contact therewith. It may be that this movement was due to the operation of a natural law, as contended by appellants, but it does not appear to us, if this be accepted as true, that it was so plain and obvious as to be within the knowledge of the ordinary longshoreman. If it was, then why was it not within the knowledge of the foreman, and means taken to overcome it? The foreman did not appreciate any such danger, for he says he did not "think it was possible to push the chute the other way because the sacks go this way (indicating); the elevation was enough to shove the chute down." Upon the whole case we can find nothing indicating to us that it is our duty to overturn the verdict, by holding the danger was so open and apparent that the rule of assumption of risk must apply. There is no necessity of entering upon any discussion of this rule or the circumstances under which the application is made by the courts. The facts in the case do not require it.

The judgment is affirmed.

CROW, C. J., ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 10981. Department Two. February 18, 1913.]

THE STATE OF WASHINGTON, *Appellant*, v. PETER MILLER,
Respondent.¹

CRIMINAL LAW—TRIAL—RIGHT TO SPEEDY TRIAL—STATUTES—CONSTRUCTION. Rem. & Bal. Code, §2312, providing for the dismissal of a criminal charge if the accused be not brought to trial within 60 days after the indictment found or information filed, is satisfied if his first trial is had within such time, and does not require that, after appeal and reversal of a judgment of conviction, a second trial shall be had within sixty days after the remittitur has gone down to the lower court.

SAME—WAIVER OF RIGHT. The right to a speedy trial, within Const., art. 1, § 22, and Rem. & Bal. Code, § 2312, providing for the

¹Reported in 129 Pac. 1100.

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dismissal of a criminal charge if the accused be not brought to trial within 60 days after indictment found or information filed, unless good cause is shown for the delay, is waived by failure to ask for a trial and acquiescence in the delay until the case has been set for trial upon the request of the state, where the state did not act arbitrarily and had a plausible excuse for the delay.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 10, 1912, dismissing a criminal prosecution for delay in bringing the defendant to trial. Reversed.

John F. Murphy and *Reah M. Whitehead*, for appellant.

Joseph M. Glasgow, for respondent.

ELLIS, J.—This is an appeal from a judgment dismissing a criminal action on the ground that the defendant, respondent here, had not been brought to trial within the time limited by law.

An information charging the respondent with the crime of burglary in the first degree was filed in the superior court of King county on August 10, 1909. The cause was brought on for trial on October 29, 1909, and on November 2, 1909, respondent was found guilty of burglary in the second degree. He appealed and secured a reversal. *State v. Miller*, 61 Wash. 125, 111 Pac. 1053, Ann. Cas. 1912 B. 1053. In pursuance of that reversal, a remittitur from this court was, on February 15, 1911, filed in the clerk's office of the trial court. Prior to September 30, 1912, no effort was made by either side to have the cause set for retrial. On that date, upon application of the appellant in open court, the cause was set for trial on October 29, 1912. Counsel for respondent objected and was granted by the court time until October 5, 1912, in which to present a motion for dismissal. Thereafter he moved for a dismissal upon the ground that he had not been brought to trial within the time limited by law. The motion was supported by an affidavit that no continuance had been asked for, and no postponement obtained by him, since the remittitur was transmitted from this court.

The prosecuting attorney, in resistance to that motion, presented his affidavit, stating, in substance, that the evidence on which the former conviction was obtained consisted largely of defendant's own confession and that of his accomplice, Taylor; that the supreme court, in reversing the judgment, held such evidence to have been obtained under duress, and hence inadmissible; that, without such testimony, or especially that of Taylor, another conviction was improbable, and it was not advisable, in the absence of such testimony, to incur the expense of a retrial; that prior to the date of the remittitur from this court, the defendant had been convicted in another case upon the same evidence and had appealed, which appeal was pending at the date of the remittitur in this case; that the state was hoping and endeavoring to induce the supreme court in the pending appeal to recede from its former ruling concerning the admissibility of one or both of the confessions; that the supreme court reversed the last conviction and so far modified its former ruling as to hold that it was "not error to submit the testimony of the accomplice Taylor to the jury;" (*State v. Miller*, 68 Wash. 239, 122 Pac. 1066); this was on April 13, 1912; that thereafter a petition for rehearing of the last-mentioned appeal was submitted to the supreme court, in the hope and belief that the supreme court might be induced further to modify its ruling as to the admissibility of the confession of the defendant; that the supreme court held that petition under advisement till September 29, 1912, when it was denied, and the affiant at once caused this case to be set for retrial; that during all the time since the conviction of the defendant in the last case appealed, he has been held under conviction and under a charge of being an habitual criminal, and upon other charges as shown by the records and files of the court; that no hardship has been worked upon him by the state's refraining from setting this case for retrial pending a final determination by the supreme court of the matters involved in the last appeal; that this cause has already

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been set for trial on October 29, 1912, which date was the earliest date at which it could be tried under the condition of the calendar in the criminal department at the time of the setting thereof; and that until the final determination by the supreme court in the case last appealed denying the petition for rehearing therein, the questions of law that have arisen and will arise in this case had not been finally decided by the supreme court, and the course which the state might or could pursue in accordance with law had not until that time been made plain.

The statute, Rem. & Bal. Code, § 2312, reads as follows:

“If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown.”

While it appears from the records that the first trial of this cause was not had within sixty days after the information was filed, it does not appear that the failure was due to any delay on the part of the prosecution. In this discussion, the question must be treated as if the respondent had actually been brought to trial originally within sixty days after the information was filed. The questions, therefore, actually presented on this appeal are: (1) Does the statutory provision above quoted, where a defendant has once been tried and convicted and the judgment reversed on appeal, entitle him to a dismissal because more than sixty days had elapsed without a retrial after the filing of the remittitur? (2) If not, was good cause shown for the delay? The first of these is a question of statutory construction; the second, a question of judicial discretion in the application of the constitutional provision for a speedy public trial.

The statute provides for a dismissal if the defendant be not brought to trial within sixty days after the indictment is found or the information filed. The statute is mandatory.

A trial must be offered by the state within the statutory period or good cause for delay shown. No initiative action is imposed upon the defendant. When, however, a trial has been had within that period, have the terms of the statute been satisfied? We must take the statute as we find it. Its mandate is to bring the defendant to trial within sixty days after the information is filed. If the legislature had intended that the same limitation of time should apply to a second trial on reversal, the words "after information filed" would have been modified by the phrase "or in case of reversal on appeal, within sixty days after the filing of the remittitur in the trial court," or by words of similar import. In the absence of such words, we are constrained to hold that the legislature did not intend to convey the meaning which they would express and which is not expressed by the words actually employed. The language of the statute is plain and unambiguous. The words used are simple and incapable of more than one meaning. Their natural meaning is that the specific limitation of time applies only to the first trial, since that trial in the natural sequence of events is the only one having an immediate relation to the time of filing the information. This is obvious, because in case of reversal on appeal, and usually in case of a new trial granted by the lower court, a retrial could not be had within sixty days after the filing of the information.

"In the interpretation of statutes words in common use are to be construed in their natural, plain, and ordinary signification. It is a very well-settled rule that so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of the court to give it force and effect." 36 Cyc. 1114.

See, also, Sutherland, *Statutory Construction*, § 238; Sedgwick, *Construction of Statutory and Constitutional Law* (2d ed.), p. 265; *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243; *Walker v. Spokane*, 62 Wash. 312,

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113 Pac. 775, Ann. Cas. 1912 C. 994. The purpose of the statute is to prevent continued incarceration without opportunity to the accused, within a reasonable time, to meet the proofs upon which the charge is based. A trial within sixty days after indictment found or information filed meets the purpose of the legislature to accord an early opportunity for relief from an unfounded charge. Having had that opportunity, the one time prescribed by the statute, a specific limit of time for a retrial is not a matter of absolute right, but the time for such retrial is addressed to the judicial discretion of the trial court in view of the whole situation.

This view is sustained by what seem to us the more persuasive authorities. In *Commonwealth ex rel. McGurk v. Superintendent of County Prison*, 97 Pa. St. 211, the statute involved declared that "if such prisoner shall not be indicted and tried the second term, sessions or court, after his or her commitment, unless delay happen on the application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment." The prisoner, having been convicted and obtained a new trial, was kept in custody for more than four terms after the new trial was awarded. The court held that he could not invoke the provisions of the statute to secure his discharge, using the following language:

"Having thus procured a new trial, which must necessarily be more than six terms after his commitment, he now seeks to apply a statute which limits the time between commitment and the first trial to the interval of time after a new trial ordered and the second trial being had. We find no warrant for such application, either in the letter or in the spirit of the statute. It is further contended that, inasmuch as when a verdict is set aside or a judgment reversed and a new trial awarded, the case goes back upon all issues of fact, as if it had never been tried, therefore this statute is made applicable. Conceding the correctness of the rule as to the manner and form to be observed in the second trial, yet the conclusion claimed by no means follows. The interval of time between the commitment and the close of the

second term thereafter cannot be retraced, nor the statute, which might then have been invoked, be made applicable to a second period of time commencing long after the expiration of the time specified in the statute."

In *Glover's Case*, 109 Mass. 340, construing a statute which required that the accused be tried "at the next term of the court after the expiration of six months from the time when he was imprisoned," the court, holding that this statute had no application to a second trial, said:

"A trial before the expiration of six months meets the purpose of the statute in securing to the prisoner an early opportunity of relief from an unfounded charge. Having had that, his application for another trial is not of absolute right, but is addressed to the judicial discretion of the court."

In *State v. Dilts*, 76 N. J. L. 410, 69 Atl. 255, the accused sought release on recognizance on the ground that, after a trial and disagreement in one term, he had not been brought to trial in the second term thereafter, under a statute providing for such release in case the defendant be not tried "at the term in which issue is joined or at the term after." The court, in denying the application, said:

"While in strictness, the word 'trial' implies a verdict, it was clearly not contemplated by the statute that a verdict must be had at the first or second term or the prisoner be entitled to his discharge. The evil which the act was intended to remedy was the continued incarceration of citizens accused of crime because of delay of prosecutors in moving the indictments for trial. If it were otherwise two disagreements at successive terms would require the defendant's discharge or a postponement for good cause by the court. Under the view we take of the meaning and purpose of the statute, it was satisfied by the trial and disagreement of April term, 1907, and became inoperative thereafter."

While we are not favored with brief or argument on respondent's part, we have made a careful examination of the authorities cited by the trial court as sustaining his de-

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cision. In *In re Murphy*, 7 Wash. 257, 34 Pac. 834, the defendant was once tried, convicted, and a new trial granted before the expiration of sixty days from the trial had. This court said that the statutory provision "should not be held to apply to this kind of a case, at any rate until after the expiration of sixty days from the making of the order setting aside the trial which was had." Manifestly the question here presented was not before the court. *In re Bergerow*, 133 Cal. 349, 65 Pac. 828, 85 Am. St. 178, 56 L. R. A. 513, construing a statute similar to ours, holds that the sixty-day requirement is applicable to the period commencing after a trial resulting in a disagreement of the jury. The court argues in substance that, if one trial be held to satisfy the statute, the same contention would apply to the constitutional guaranty of a speedy trial. We think not. The statute fixes a *specific time beginning with a specific event* within which trial must be had unless good cause to the contrary be shown. That specific event, the filing of information, limits the operation of the statute to the first trial. The provision in the constitution, art. 1, § 22, contains no such limitation. The provision for a speedy public trial therein contained, therefore, applies to all time during which the accused is subject to trial, and inasmuch as it fixes no time as defining a speedy trial, the time of retrial after the statute has been satisfied by a first trial is of necessity left to the judicial discretion of the trial court. What in such a case is a speedy trial must depend upon the circumstances of the case.

"Again, it is required that the trial be *speedy*; and here also the injunction is addressed to the sense of justice and sound judgment of the court." Cooley, *Constitutional Limitations* (7th ed.), 440.

There is another distinction between the mandate of the statute and the provision of the constitution. The one is a statutory mandate, the other a constitutional privilege. The

statute imposes upon the state the duty to bring the accused to trial within the sixty days. The state must take the initial action. The constitution accords a right to the accused to a speedy public trial. If he does not demand it, he should not complain.

Such is the rule under statutes not mandatory.

“A demand for a trial, a resistance to a postponement, or some other effort to secure a speedy trial must be shown to entitle the accused to a discharge under the statute by reason of the delay of the prosecution.” 12 Cyc. 500.

That a constitutional right may be waived by the accused has been repeatedly held by this court. *State v. Ash*, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611; *State v. Quinn*, 56 Wash. 295, 105 Pac. 818. This court has also held that even the mandatory statutory provision is waived by a failure to ask for a dismissal until just before trial. *State v. Alexander*, 65 Wash. 488, 118 Pac. 645. See, also, *State v. Seright*, 48 Wash. 307, 93 Pac. 521; *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912 B. 153. *A fortiori* it would seem that the constitutional right should be deemed waived by the failure to ask for a trial, the silent acquiescence in the delay, and the failure to claim the constitutional right until the cause had been definitely set for trial upon the request of the state, and then only by a motion to dismiss.

“As to what constitutes a speedy trial, and what action must be taken by the accused to avail himself of the right to a dismissal because of delay, the authorities are conflicting. Except in so far as statutes may otherwise require, we think the rule should be that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial on the part of the accused, should be shown to entitle him to a discharge on the ground of delay. 12 Cyc. 500. All our statute requires is a trial at the next term after the finding of the indictment, unless for good cause shown or upon application of the accused it be postponed. It does not declare that in case of a disagreement a second trial must be had at the next succeeding term. Nevertheless, under

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the constitution, another trial should follow a disagreement with reasonable speed or the action should be dismissed. What is reasonable speed depends upon the circumstance surrounding each particular case. There is, therefore, nothing in our statutes or constitution which precludes recognition of the rule that, where one trial has taken place in compliance with the statute, which has resulted in a disagreement, it is incumbent upon the accused to at least manifest a desire for another trial before he is entitled to a dismissal on the ground of delay." *State v. Lamphere*, 20 S. D. 98, 104 N. W. 1038, 1040.

There can be no question that, if at any time during the period after the remittitur from this court the respondent had demanded a speedy trial, it must have been accorded him or the information dismissed, in the absence of good cause shown for a continuance on the state's part. Nor do we hold that the showing now made by the state would have been sufficient had a trial been demanded. We do hold, however, that the showing made should be held a sufficient excuse for failure to bring the respondent to an earlier trial, since he has never expressed a desire to be tried. The constitutional privilege of a speedy trial was intended to prevent an arbitrary, indefinite imprisonment, without any opportunity to the accused to face his accusers in a public trial. It was never intended as furnishing a technical means for escaping trial. It does no violence to this provision, either in letter or spirit, to hold that there has been no arbitrary denial of the right to a speedy trial under the circumstances set forth in the state's showing, where as here the accused has never demanded a trial.

The judgment is reversed, and the cause is remanded for trial.

CROW, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10790. Department Two. February 18, 1913.]

H. R. DOWNIE, *Appellant*, v. CHARLES G. SAVAGE *et al.*,
Respondents.¹

PARTNERSHIP—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY. A finding that one of two brothers, employed by the other, was not a partner in the business nor liable as a partner by reason of having held himself out as a partner, is sustained, where although his brother did business under the name of S. Brothers (having bought out a former partnership business of a deceased brother, conducted in that name), and used letter-heads and received mail addressed in such firm name, and although many persons considered him a partner from such circumstances and the conduct of his brother, he himself had never assumed to act as a partner nor done or said anything to create the impression or mislead any person.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 29, 1912, upon findings in favor of the defendants, in an action on contract, denying the liability of the defendants as partners, after a trial to the court. Affirmed.

Bates, Peer & Peterson, for appellant.

MORRIS, J.—It is sought in this action to establish a liability against respondents as partners. The court below held that respondents were not partners, and that judgment should go against Howard P. Savage alone.

There is no evidence from which it can be held that, as between themselves, the respondents, who were brothers, were partners. In fact, it clearly appears that they were not. The main contention of appellant is that Charles G. Savage held himself out as a partner, and is therefore liable as such. It is now too late to question the rule that, irrespective of what is the true relation as between themselves, persons can so hold themselves out as partners in a particular business and thereby induce others to deal with them as such

¹Reported in 129 Pac. 1096.

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and give credit on the faith of such a relation, that as to such third persons the relation will be held to exist. The rule that fixes such a liability, when in reality the relation does not exist, is a familiar illustration of the general principle of estoppel when acted upon by another. While there is ample evidence in the record to establish the fact that many persons, including appellant and other creditors who have assigned their claims to him, regarded and generally understood the brothers were partners, we can find no instance in the record where any holding out of the existence of such a relation was done by Charles G. Savage, or with his assent, express or implied. One witness, not interested in any claim in suit, testifies that, on one occasion, Howard P. Savage introduced Charles G. Savage to him as his partner. This is denied by each of the brothers, and as the court finds against it, we accept its findings, as we cannot say that the evidence so preponderates in appellant's favor as to require a finding in his favor upon this point. It also appears that, at one time, Charles G. Savage and a third brother were in partnership as Savage Brothers. The third brother died, and Howard P. Savage purchased the business and its assets from Charles G. and the administrator of the deceased brother. In doing so, he acquired letter-heads, envelopes, and blank checks upon which appeared the name "Savage Brothers," with the picture of two savages. Howard P. then engaged in a different business and adopted the business name or style of "Savage Brothers." In paying claims in the business in question, he used these checks, adding to the printed signature, "By Howard P. Savage." It may also be found that, in ordering supplies, he directed them to be sent to "Savage Brothers." But it nowhere appears that Charles G. Savage at any time gave any such directions or had any knowledge of any inference upon the part of any person that he was regarded as a partner.

The business out of which these debts grew was a small mill business at Mineral, in which Charles G. Savage worked

as head sawyer. He does not appear to have had any charge or supervision of the business such as one would expect from a proprietor. All the orders and directions came from Howard P. It also appears that mail came to the camp addressed to "Savage Brothers," and that Charles G. Savage knew of such fact, and that he also knew that supplies came to the camp with a like direction. From this it is urged that it must be held there was an implied if not express holding out. It does not appear to us, however, that this can be taken for anything more than a consent on the part of Charles G. that Howard P. might do business under the name and style of "Savage Brothers," which fact alone we do not think is sufficient to indicate that Charles G. was a partner, until he did something or said something that would indicate to others he was to be so regarded, especially in view of the undisputed fact that, at the mill and in the camp where these creditors were employed, Charles G. never assumed to act as a proprietor, gave orders, nor took charge as such. Nor did any of these creditors ever address him as a partner, make inquiries of him as such; nor, when they failed to receive their wages and thus knew of the failure of the business, did they make any demand of him for payment, nor in any way treat him as having any responsibility in the matter. To all intents and purposes, notwithstanding they now say they regarded him as a partner, they then did nothing nor said anything that would indicate such an understanding on their part; nor does their then conduct show other than that he was regarded as an employee.

In order to work the estoppel upon which the rule of liability as a partner to third persons exists, it must appear that the one upon whom the liability is sought to be fixed does something which induces other persons to act and rely thereon to their detriment. It is not what Howard P. Savage might have done, nor what others might have thought, but what Charles G. Savage himself has done, what he himself has said, or the manner in which he has acted that has led

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others to act under the belief or impression created by him that he was a partner. Such facts do not here exist. The addressing of the mail or the direction of the supplies alone is not sufficient. Nor the fact that his name did not appear in the time book. The names of other employees likewise failed to appear therein. Nor the fact that no charge was made against him for tobacco he obtained at the camp commissary maintained for the use and benefit of the men. All these facts were subsequent to the employment of appellant and his assignors, and they therefore cannot be said to have induced them to enter the employment upon the faith of anything Charles G. Savage may have done, nor to have given credit upon the belief induced by what he may have said or done that responsibility for the payment of their wages to any extent rested upon him. Certainly nothing occurring subsequent to the formation of a relation can be said to have been a controlling or inducing cause in the creation of that relation. And it is upon the misleading of appellant and his assignors to their prejudice, either positively or tacitly, by Charles G. himself when the relation of employer and employee began and credit was given, that alone must be determined the estoppel that fixes liability.

We are therefore of the opinion that there is no reason in fact or law which establishes error in the judgment, and the same is affirmed.

CROW, C. J., ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 10794. Department Two. February 18, 1913.]

JAMES OLDFIELD, *Respondent*, v. ANGELES BREWING & MALTING COMPANY, *Appellant*.¹

PLEADING—ISSUES AND PROOF—FATAL VARIANCE. Where a judgment for rent due was reversed for the reason that the defendant, who never accepted a lease, was liable only for breach of an agreement to lease, and that the proper measure of damages was the difference between the stipulated rent and the actual rental value for the term, it is error to proceed on a second trial, over defendant's objection, without amending the complaint, which only alleged a specific rental due, and tendered no issue as to the rental value of the premises and made no demand for damages in any sum.

SAME—AMENDMENT TO CONFORM TO PROOF—OBJECTIONS. A complaint cannot be deemed amended to conform to proof of an issue in no manner tendered, the evidence being admitted over the constant objection of the defendant.

RECEIVERS—ACTIONS—LEAVE TO SUE. Where a receiver was appointed after an action was commenced, it is not necessary to obtain leave to sue the receiver.

PLEADING—COMPLAINT—AMENDMENT—DEPARTURE. In an action for rent due, under a lease which the defendant refused to accept after agreeing to do so, the complaint may be amended to show a cause of action for damages for refusing to take the lease.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 11, 1912, upon findings in favor of the plaintiff, in an action on contract tried to the court. Reversed.

Willett & Oleson, for appellant.

Chas. F. Munday, Walter S. Fulton, and R. L. Blewett, for respondent.

ELLIS, J.—This action was before us on the same complaint in *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 113 Pac. 630, Ann. Cas. 1912 C. 1050, 35 L. R. A. (N. S.) 426, to which reference is now made for a complete

¹Reported in 129 Pac. 1098.

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statement of the material facts. We there held that, the respondent having erected a building under an agreement to lease it to the appellant for a term of five years, and the appellant having refused to take possession because of a statute subsequently passed prohibiting its use for saloon purposes, the breach of contract was actionable whether the technical relation of landlord and tenant was ever created or not, and that the measure of damages was not the fixed rental of \$350 a month, as awarded by the trial court, but the difference between the amount stipulated in the contract and the actual rental value for the specified term. For error in applying the incorrect measure of recovery, the cause was there reversed.

A reading of the complaint and of the opinion on the former appeal makes it manifest that the respondent mistook the nature of his cause of action. He brought his action upon the lease for a recovery of the rent reserved from the time the building was tendered to the time of the commencement of the action amounting in all to \$3,850. The prayer was for that amount, with interest from accrual upon the amount of each month's rent going to make up the aggregate. His evident theory, and that of the trial court on the first trial, was that there would be a right of action for each month's rent and that the failure to pay the rent would constitute successive breaches. There was, however, but one breach, and that was complete and final, going to the whole contract. It was made by the refusal to accept the building. In such a case, the cause of action is entire and the measure of damages is the loss suffered, namely, the difference between the entire rent reserved and the entire rental value for the term. It is obvious that the complaint, which did not tender as an issue that there was such a difference, did not allege any loss or damage, and hence did not state a cause of action.

After the former reversal, the action was noted by the respondent for a retrial in the superior court. The complaint was not amended in any particular. The cause was

tried to the court without a jury. When it was called for trial, it was upon the same complaint as before, seeking recovery for the installments of rent reserved and past due and interest thereon. The appellant, at the commencement of the trial, objected to the introduction of any evidence on the ground that the complaint failed to state a cause of action; that it was a complaint for the recovery of rent only, and pleaded no damages. The court overruled the objection, and the respondent then moved for a continuance in order to prepare to meet the issue of damages which was not presented by the complaint, but which the court had indicated would be tried. The continuance was denied. Throughout the trial, when evidence was offered tending to prove the rental value of the premises, the appellant strenuously objected to its introduction on the ground that it was not within the issues. The evidence was, however, admitted and at the close of the trial the court found that the reasonable market rental value of the premises for the period covered by the contract of lease was \$150 a month, aggregating \$9,000 for the five years; that the aggregate rental provided for in the contract was \$21,000, and that the difference was \$12,000. Exceptions were reserved to the findings. Judgment was rendered against the appellant for \$12,000, being \$5,600 more than prayed for, and for costs, whereupon this appeal was taken.

The respondent contends that the issue tried was sufficiently defined by the opinion of this court on the former appeal. That opinion, however, did no more than declare as the law of the case that the action could not be maintained for rent, but for damages for breach of contract only, and defined the measure of damages in such an action. The complaint did not tender the issue tried, and we know of no rule of law permitting the opinion of the appellate court to be treated as a pleading. The statute, Rem. & Bal. Code, § 258, requires that the complaint contain a plain and concise statement of the *facts* constituting a cause of action, and a *demand* for the relief which the plaintiff claims. The com-

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plaint here did neither of these things. It tendered no issue as to the rental value of the premises, and made no demand for damages in any sum. It tendered an issue for the recovery of specific rental, not for the recovery of unliquidated damages. Our former opinion having in effect pointed out that the issue tendered by the complaint was a false one, upon which no recovery could be had, it would be most incongruous to hold that, without change, it now presented the very issue which we there in substance held it did not present.

It is familiar law that where a complaint sets forth facts entitling the plaintiff to some relief, such relief will not be denied merely because he has mistaken his remedial right, but such is not the case here. No facts showing damages in any sum or the right to any relief were pleaded. The only possible ground of relief was that the rent reserved exceeded the rental value. Neither this, nor any fact tending to show this, was alleged. There was no basis in the pleadings for the admission of any such proof.

It is urged that the complaint should be treated as amended to conform to the proof. This rule, however, has no application where the evidence has been introduced over objection and the issue tried was in no manner tendered in the complaint. The record is replete with objections pointing out the inadmissibility of the evidence under the issue tendered. No leave to amend was requested. No rule of construction, however liberal, can permit the trial of an issue not tendered in the complaint over the objection of the defendant. To permit such a course would be to ignore the statute, dispense with formal pleadings, and invite endless confusion. The trial court should have directed that the complaint be amended to conform to our former ruling, on pain of dismissal.

We find no merit in the appellant's contention that the action cannot be maintained without first securing leave to sue the receiver of the appellant, who was appointed subsequent to the commencement of the action. Nor do we find

merit in the claim that the evidence was not sufficient to establish the execution of the contract of lease. That question was, in effect, passed upon adversely to the appellant's contention on the former appeal.

The cause of action being the same breach of contract, declared upon in the original complaint, there can be no question as to the right to amend so as to present issuable facts showing damage.

The judgment is reversed, and the cause is remanded with leave to the respondent to amend so as to present the real issue involved, and for retrial upon that issue.

CROW, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10753. Department One. February 19, 1913.]

CIRIACO D'AMBROSIO, *Respondent*, v. FRANCISCO NARDONE
et al., *Appellants*.¹

LANDLORD AND TENANT — SUBTENANTS — ATTORNMENT — RIGHTS OF SUBLESSEES — CONSIDERATION FOR ASSIGNMENT. Where a lessor ratified an assignment of a lease by accepting attornment from the sublessees, and was willing that the court should decide as to who were his tenants, he is estopped to deny the right of the sublessees to attorn under the lease; hence they cannot defend an action for the purchase price of the lease by asserting failure of consideration and failure to procure an assignment of the lease.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 9, 1912, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

H. M. Dalton (*James B. Metcalfe* and *J. Vernon Metcalfe*, of counsel), for appellants.

Oscar G. Heaton and *Douglas, Lane & Douglas*, for respondent.

¹Reported in 129 Pac. 1092.

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Opinion Per CHADWICK, J.

CHADWICK, J.—Plaintiff was the lessee of a certain five-acre tract which was devoted to truck farming. He had a lease for a term of four years. He sold his “business and lease” to defendants, who went into possession and have paid four half-yearly rent payments, three to plaintiff and one to the original lessor. One of the covenants of the lease is that the lessee will not assign or sublet the property without the written consent of the lessor. Default being made in the payment of the note given in payment for the business and lease, this action was begun, and defendants have answered, pleading a failure of consideration in that plaintiff has never procured an assignment of the lease.

The court found that the original lessor, who was a witness at the trial, had ratified the assignment by accepting an attornment from the defendants. The testimony is ample to justify this conclusion. There is some suggestion that the rent paid the original lessor was paid to his son who acted as his agent, and that his act has not been ratified. The lessor did not repudiate the conduct of his son when he was upon the stand in this case as a witness. He said that he was willing that the court should decide as to whether the lessee or these defendants were his tenants. This would estop him to deny the right of the defendants to attorn under the lease.

The judgment of the lower court is affirmed.

CROW, C. J., PARKER, GOSE, and MOUNT, JJ., concur.

[No. 10595. Department One. February 19, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. B. J. MILLER,
Appellant.¹

INTOXICATING LIQUORS—LOCAL OPTION—DELEGATION OF LEGISLATIVE POWERS. The local option law is not an unwarranted delegation of legislative power to the electors of the various local option units.

WITNESSES—IMPEACHMENT—COMPETENCY OF WITNESS. An impeaching witness is not qualified to testify as to the reputation for truth and veracity of another, where he did not know him and merely prosecuted an inquiry for seven days, making inquiry of forty or fifty people.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—COMMENT ON FACTS. In a criminal prosecution, a request to instruct that the evidence of detectives or police officers must be closely scrutinized and weighed with great care, owing to the nature of their business and the tendency to overdraw their testimony, is properly refused; as the same would have been unlawful comment upon the evidence in violation of Const., art. 4, § 16.

APPEAL—REVIEW—RECORD. Objection to costs cannot be urged on appeal, where the record falls to show what disposition, if any, was made of a motion to retax costs.

Appeal from a judgment of the superior court for Lincoln county, Baske, J., entered September 25, 1911, upon a trial and conviction of selling intoxicating liquors in violation of the local option law. Affirmed.

Martin & Wilson, for appellant.

James S. Freece and *C. A. Pettijohn*, for respondent.

PARKER, J.—The defendant was convicted in the superior court for Lincoln county of selling intoxicating liquor in the city of Davenport, while that town was a unit within which the sale of intoxicating liquor was prohibited by virtue of an election held therein under the local option law. Laws 1909, p. 153; Rem. & Bal. Code, § 6292, and following. He has appealed to this court.

¹Reported in 130 Pac. 356.

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Opinion Per PARKER, J.

It is first contended by counsel for appellant that the local option law is unconstitutional and void, in that it constitutes an unwarranted delegation of legislative power to the electors of the various units defined by the law. This contention is fully answered in favor of the prosecution by our decision in *State v. Donovan*, 61 Wash. 209, 112 Pac. 260, and cases there cited.

It is contended that the court erred in excluding the offered testimony of the witness Kelly, as to the reputation for truth and veracity of the witness Butler who had testified for the prosecution. This offered testimony was excluded upon the ground that the witness Kelly did not show himself qualified to testify as to the reputation of the witness Butler. Kelly testified concerning his knowledge of Butler as follows:

"Q. Do you know where this man lives, where he makes his home? A. I don't know where his home is. I know where he stopped in Spokane. Q. How long have you known him? A. Several days while I was looking him up. Q. About how many days were you looking him up? A. Along about the first of the month up until the time he was arrested. Q. How many days? A. About seven days. . . . Q. And you were employed by some one to look him up, were you? A. I was asked by the sergeant of detectives to go out and look him up. . . . Q. How many people did you ask about him? A. Forty or fifty. . . . Q. This inquiry extended over a period of about seven days? A. Yes, sir. Q. And you asked these people what they knew about him, and from what they told you, after you made inquiry about him, as to where he was and what he was, you arrived at your conclusion as to his reputation? A. Yes, sir."

We are of the opinion that this does not show such an acquaintance with Butler's reputation as to qualify Kelly to testify relative thereto. In the text of 40 Cyc., at page 2630, it is said:

"A stranger sent out by one party to learn the character of a witness of the other party should not be permitted to testify as to the result of his inquiries."

This rule seems to be fully supported by the decisions. In the case of *Curtis v. Fay*, 37 Barb. 64, the court said:

"The witness Pritchard was not qualified to testify in relation to Jones' character or reputation. He did not know, himself, anything about Jones' reputation. All he could testify on the subject of his reputation was what some persons at Geneva, whom he did not know, told him it was. An impeaching or sustaining witness is not to speak of the reputation unless he knows it, and such knowledge must be founded upon an acquaintance and intercourse with the neighbors and acquaintances of the individual whose character is in question, and that intercourse must be of some length of time—sufficient at least, to enable him to gather the general estimation in which he is held in the community where he resides."

See, also, *Reid v. Reid*, 17 N. J. Eq. 101; *Clapp v. Engledow*, 72 Tex. 252, 10 S. W. 462. Our decision in *Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179, is in harmony with this view.

The prosecution relied for conviction principally upon the testimony of two witnesses who, for the sake of argument, we may regard as detectives. Counsel for appellant requested the court to instruct the jury as follows:

"You are instructed that if you find from the evidence that any detective or police officer has given testimony herein, under the law you are to weigh the testimony of such witnesses with great care and to closely scrutinize the same, owing to the nature of their business and the almost unavoidable tendency of such witnesses to overdraw their testimony."

The refusal to give this instruction is assigned as error. There might possibly be some ground for the giving of such an instruction in jurisdictions where the court may comment upon the facts, though even in such jurisdictions we think that the giving of such an instruction would be within the discretion of the trial court, with which the appellate court would not interfere. Section 16, art. 4, of our constitution, provides:

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

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This provision is contained in substance in the statutes of Texas, and disposing of a similar question in *Copeland v. State*, 36 Tex. Cr. 575, 38 S. W. 210, the court of criminal appeals said:

“We think the court did not err in refusing to give this instruction. It singles out two witnesses and charges upon the weight of the evidence, and calls the attention of the jury specially to these facts, as weighing upon their credibility. We know of no statute in our state that authorizes the court to single out a particular witness, and charge upon the weight of his testimony, except in cases of perjury and in those cases where the state relies upon the testimony of an accomplice. In all cases the courts are prohibited from commenting upon the weight of the testimony of witnesses, and inhibited from charging upon the weight of a particular witness or class of witnesses, unless that power is conferred by the statute; and, wherever those statutes create, or give that power, they constitute exceptions to the general rule, prohibiting the court from charging upon the weight of the evidence. The two witnesses referred to in this case are not accomplices. They were simply employed as detectives to ferret out that character of violations of the law about which they testified, to-wit: Gambling and violations of the whiskey law. See, *Muely v. State*, 31 Tex. Crim. Rep. 155.”

A similar question, raised under the Montana statute, was disposed of by the supreme court of that state in harmony with this view, in *State v. Paisley*, 36 Mont. 237, 92 Pac. 566; *Hronek v. People*, 134 Ill. 139, 24 N. E. 861, 23 Am. St. 652, 8 L. R. A. 837. It seems clear to us that the giving of the requested instruction would have been a comment upon the facts, and in direct violation of our constitutional provision above quoted.

Some contention is made upon the sufficiency of the evidence to sustain the verdict. We deem it sufficient to say that we have read the entire evidence brought here in the statement of facts, and are satisfied that we would not be warranted in interfering with the conviction upon the ground of this contention.

Some contention is made against some small items of cost charged against appellant in the cost bill. While we find in the record a motion to retax costs on the part of appellant, we do not find any disposition made thereof by the trial court. We therefore think the question is not properly before us for consideration.

Other contentions made by counsel for appellant we think are wholly without merit, and are not such as call for further discussion.

The judgment is affirmed.

Crow, C. J., and Mount, J., concur.

Gose, J. (concurring)—I think the requested instruction cautioning the jury to weigh the testimony of a detective with care and to give it close scrutiny goes further than the law would warrant. Had it stopped with this caution I would think its refusal was error. The closing words, however, "owing to the nature of their business and the almost unavoidable tendency of such witnesses to overdraw their testimony" are a comment on the facts and inhibited by art. 4, § 16, of the constitution. I therefore concur.

CHADWICK, J., concurs with Gose, J.

[No. 10741. Department Two. February 19, 1913.]

JAMES DONOFRIO *et al.*, *Appellants*, v. THE CITY OF SEATTLE,
Respondent.¹

EMINENT DOMAIN—GRADE OF STREET—"DAMAGING" OF PROPERTY—COMPENSATION—REMEDIES—INJUNCTION. A city in making the original grade of a street, has no right to extend the foot of the fill upon abutting property, or in making a cut, to construct the slope thereon; since it would be a "damaging" of private property without just compensation having been first paid into court, within Const., art. 1, § 16; and injunction is the proper remedy to prevent the same, if the damages are substantial.

¹Reported in 129 Pac. 1094.

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Opinion Per MAIN, J.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 21, 1912, dismissing an action for injunctive relief, upon sustaining a demurrer to the complaint. Reversed.

Blake & Williams, for appellants.

James E. Bradford and William B. Allison, for respondent.

MAIN, J.—This is an action for injunctive relief. The plaintiffs' complaint, after alleging the status of the parties, the description of the property involved, and the ownership thereof, alleges:

"(3) That said city under and by virtue of ordinance number 26,830, approved on the 27th day of March, 1911, purported to provide for an improvement of said Bayview avenue along and bordering upon plaintiffs' said property by grading and curbing the same, and have entered into a contract with the defendants, Kalberg & Brandon, for the doing of said grading and curbing.

"(4) That under the plans provided by said ordinance and made a part of said contract, the defendants are threatening to and are about to make a fill along said Bayview avenue in front of said property, between 26th avenue south and 28th avenue south, of an average height of 11 feet; that said defendants are contemplating making fills extending upon plaintiffs' said property for an average distance from said street of 15 feet, and have actually staked out such fills upon plaintiffs' said property; that said defendants are threatening and about to make fills extending over and upon plaintiffs' said property for a distance of 15 feet or more in width and of about 500 feet in length.

"(5) That under the plans provided by said ordinance and made a part of said contract, defendants are threatening and are about to make a cut along said Bayview avenue, between 28th avenue south and 30th avenue south for an average depth of 9 feet; that said defendants, in order to protect said cut, are contemplating taking earth from plaintiffs' said property to an average distance of said street of 15 feet, and have actually staked out the extent of such taking upon plaintiffs' said property, and that said defendants are threatening to and are about to take property extending over and

upon plaintiffs' said property for a distance of 15 feet or more in width and 500 feet in length.

"(6) That by reason of said fill and cut and the grading of said street as aforesaid, all access to the said premises from said Bayview avenue will be cut off, and said premises between 26th avenue south and 28th avenue south will be placed an average of 11 feet below the now level of said street, and the slope that said defendants are threatening to and about to actually place upon said property will extend over and onto the same a distance of 20 feet and over, and will materially damage and destroy the use of said property for residence or any purpose for which it is adapted; that between 28th avenue south and 30th avenue south said premises will be placed an average of 9 feet above the now level of said street, and in order to maintain said grade the property of the plaintiffs will be taken for a distance of 15 feet and over, and said property will be materially damaged and destroyed for any purpose for which it is adapted.

"(7) That the damage that will be suffered by said plaintiffs by reason of said acts of said defendants as aforesaid will amount to at least the sum of three thousand dollars (\$3,000), and said premises or any part thereof will not be benefited in any manner whatsoever by the filling in and grading of said street as aforesaid.

"(8) That the grade to which said street is being filled is an unreasonable and unnecessary one, and no condemnation proceedings of any kind have been had to ascertain the damages to plaintiffs' said property by reason of the filling in of said street and the making of slopes on plaintiffs' property, and for the taking away of earth from plaintiffs' said property, and no compensation of any kind has been paid to these plaintiffs on account of said damages, and these plaintiffs have not consented to said work.

"(9) That said plaintiffs have protested against the grading and filling in of said street, but notwithstanding the same, said defendants are threatening to and are actually about to fill in said street and make the cuts as aforesaid, and make the slopes upon said property as hereinbefore set out, and unless restrained by an order of this court, said defendants will proceed to fill in said street and run slopes onto plaintiffs' said property and take away earth from plaintiffs' said property and damage plaintiffs' property as aforesaid,

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without first ascertaining and paying for such damages as required by law; that these plaintiffs have no plain, speedy and adequate remedy at law for the injuries herein complained of.

“(10) That the defendants have actually dumped large quantities of earth on plaintiffs’ property and the plaintiffs have been damaged to the amount of seven hundred dollars (\$700) by the dumping of said earth on their property.”

To this complaint the defendant interposed a demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the trial court. The plaintiffs thereupon elected to stand upon their complaint and refused to plead further. The action was dismissed. From the judgment of dismissal, the plaintiffs have appealed.

Upon this appeal all the allegations of the complaint must be accepted as true. The legal question here presented is, Does the city, in the original grading of a street, have the right in making a fill to extend the foot of the slope upon the abutting private property, or in making a cut, to construct the slope upon abutting property, without first having acquired the right to do so by a condemnation proceeding or by some other legal means? This is not a question of liability on the part of the city for the reducing of the natural surface of the street in the course of its normal and ordinary improvement for street purposes to a grade line for the first time established; but it is a question which involves the right of a municipality, in the original grading of a street, to make an actual physical invasion of adjoining property. In the case of *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, it is held that the city is not liable for damages resulting from the original grade of the street, and the opinion states:

“In the absence of some statute, a municipal corporation is not liable for damages resulting from the original grading of a street, alley, or avenue, either within the original corporate limits or in any addition thereto. The power to es-

tablish grades is incident to its charter, and is implied from the dedication."

But this decision does not reach the question here presented. It deals only with the question of the grading of the street, and not with the actual physical invasion of the adjoining property.

In § 16, of art. 1, of the constitution of the state of Washington, it is provided:

"No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner."

Under this constitutional provision it has been held that the extending of slopes upon private property is not a taking within the inhibition of the constitutional provision, but is a damaging. *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607; *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757. In the course of the opinion in the *Compton* case, it is said:

"The construction of slopes such as are in contemplation here is not necessarily a '*taking*' but is a '*damaging*' merely."

It requires no argument to show that, if the construction of slopes upon property abutting upon the street is a damaging thereof, the extending of the foot of the fill is likewise a damaging. Both involve the physical invasion of adjoining property.

The constitutional provision above quoted provides that property shall not be taken or damaged without compensation first being made or paid into court for the owner. If the allegations of the complaint above quoted are true, the respondent was extending slopes and fills upon the plaintiffs' property without first having acquired the legal right so to do. This being accepted as the fact, do the plaintiffs have the right to restrain such intrusion until compensation has been determined and paid? It has become the settled law of this state that under such circumstances plaintiffs are entitled to injunctive relief when the damages complained of

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are not merely nominal but substantial. *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201.

In the *Olson* case, it is said:

“That injunction is a proper remedy in a case where the public authorities seek to take private property for a public use without first making compensation therefor was determined in this court in *Brown v. Seattle*, 5 Wash. 35, (31 Pac. 813, 18 L. R. A. 161), and has been followed in practice ever since.”

We have been cited to no authority, and know of none, which justifies the city, without first having acquired the legal right to do so, in making a physical invasion of the adjoining property when bringing the surface of a street to the grade line for the first time established. Such physical invasion of adjoining property comes within the inhibition of the section of the constitution above cited.

The respondent in its brief makes numerous contentions to the effect that the complaint does not state a cause of action; but a detailed discussion of these is unnecessary. They are all met and answered by what has heretofore been said in this opinion. We think the complaint states a cause of action. The cause will be reversed and remanded, with directions to the superior court to overrule the demurrer.

CROW, C. J., ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 10850. Department Two. February 19, 1913.]

LESLIE McILWAINE *et al.*, *Respondents*, v. TACOMA RAILWAY
& POWER COMPANY, *Appellant*.¹

CARRIERS—INJURY TO PASSENGERS — ACTIONS—INSTRUCTIONS—ASSUMPTION OF FACTS. An instruction to the effect that, if the jury find that a passenger was notified that a car was going to the barn and passengers would not be carried, it was the duty of the passenger to get off and of the company "to keep the car standing still," is not an unlawful comment on the facts in that it assumes that the car was standing, a disputed question in issue, where the instructions, construed as a whole, merely meant that it was the duty to keep the car motionless while the passenger was getting off.

SAME—INSTRUCTIONS—DUTY OF PASSENGER. An instruction that it was the duty of a passenger to "immediately alight" upon being informed that the car did not carry passengers and was going to the barn, is not erroneous in that it was her duty to wait until the car stopped.

DAMAGES—PERSONAL INJURIES—FUTURE DAMAGES—INSTRUCTIONS. An instruction, in an action for personal injuries, that plaintiff was entitled to recover "further expense which may happen in the future by reason of the injuries received" is not prejudicially erroneous, where other instructions were given plainly telling the jury what results they could consider in that connection.

TRIAL—INSTRUCTIONS ALREADY GIVEN. It is not error to refuse a requested instruction that is covered in other language in the general charge.

CARRIERS—WHO ARE PASSENGERS. One who boards a street car stopping at a usual stopping place, intending to pay her fare, is a passenger until she safely alights therefrom, although the car was on the way to the barn and she was notified to get off.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 3, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by a passenger in alighting from a street car. Affirmed.

¹Reported in 129 Pac. 1093.

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Opinion Per MORRIS, J.

J. A. Shackelford and F. D. Oakley, for appellant.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for respondents.

MORRIS, J.—The errors here assigned are to instructions given the jury in a case where the issue was whether Mrs. McIlwaine boarded one of appellant's cars as it made a safety stop, and, when informed by the conductor that the car was going to the barn, started to get off, and while attempting to do so, the car was suddenly started forward, throwing her to the ground, and inflicting the injuries complained of; or, as claimed by appellant, that she recklessly attempted to alight from the car in an improper manner while it was in motion.

The first instruction complained of is this:

"The court instructs you that if you find from the testimony that the plaintiff was notified that the car in question was bound for the barns, and if the plaintiff was led to believe that passengers would not be carried upon the car at that particular time, then it was her duty to alight therefrom, and it was the duty of the defendant company, through its motorman and conductor, to keep the car standing still until the plaintiff would have a reasonable time to alight therefrom."

It is contended that this instruction is erroneous for two reasons: (1) It assumes the only material fact in the case, and is therefore a comment with respect to a matter of fact; and (2) it is an erroneous statement of the law as applied to the facts.

It is undoubtedly error for a trial court in its instructions to the jury to infringe upon the constitutional mandate that "judges shall not charge juries with respect to matters of fact, nor comment thereon." It is said this instruction comments upon the only issuable fact in the case, in that it assumes, in saying it was the duty of the defendant "to keep the car standing still," that the car was standing still when Mrs. McIlwaine attempted to get off. We hardly think the

jury, on hearing this instruction, would take this view of it, or accept the court's meaning in any other sense than that it was the duty of the defendant to keep the car motionless while plaintiff was in the act of alighting. We have often said, in determining the meaning and effect of instructions, they must be read as a whole. Turning to another instruction we find the court saying to the jury: "If you find from the evidence in this case that the plaintiff undertook to alight or jump from said car while the same was in motion and before it had come to its regular stop," she would be guilty of contributory negligence and could not recover. It is, we think, plain that, in hearing this instruction, the jury would understand that they might determine from the evidence that plaintiff did attempt to alight from the car while it was in motion, and that the questioned instruction was nothing more than an indication to them of the duty imposed on defendant not to move cars while passengers are in the act of alighting.

The second complaint of this instruction is that it is erroneous in telling the jury that, if the plaintiff was notified that the car was bound for the barn, it was her duty to immediately alight therefrom. Counsel says, "it was plaintiff's duty to remain on the car until it was stopped for the purpose of permitting her to alight," and it was not her duty to *immediately* alight therefrom when notified it was going to the barn. We do not think the ordinary juror would follow this critical analysis of the language used, or take it to mean other than that, when Mrs. McIlwaine learned the car was going to the barn, she could not remain thereon as a passenger, but should get off, and while she was getting off, defendant should keep the car standing still.

The second instruction complained of is one in which the court, in giving the jury the measure of damages, said to them they might include "further expenses which may happen in the future by reason of the injuries received." Standing alone this would be error; but the court gave the jury

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three instructions embodying the rule to guide them in arriving at the amount in case of verdict for plaintiff, in which they are plainly told they are not to consider results which may or may not happen, nor allow anything for future pain or suffering, unless satisfied by a fair preponderance of the evidence that future pain and suffering are reasonably certain to result. Again, they are told that, in assessing damages, they must confine themselves to such pain and suffering already endured and such as "will in reasonable probability" be endured as a result of the injuries received, as well as for any liabilities incurred by reason of doctor, hospital, and medicine bills; all as shown by the evidence in the case and not otherwise. We think the jury, from these instructions, would get the right idea, that in making their award they were limited to results reasonably probable, and to those established by a fair preponderance of the evidence.

Complaint is next made of the court's refusal to give an instruction requested by appellant. The instruction offered, we think, is a correct statement of the law; but it seems to us the court covered the point in language differing somewhat from that chosen by counsel for appellant, but conveying the same meaning to the jury, and hence we cannot say the refusal was error.

Finally, it is contended Mrs. McIlwaine was not a passenger, and therefore it was error to hold the appellant to the highest degree of care. Mrs. McIlwaine boarded the car believing it to be one on which her husband was conductor, intending to pay her fare. We think that, while on the car, she was a passenger so far as imposing a duty upon the appellant, and that this duty continued until she had alighted in safety. The evidence is susceptible of a finding which, in the light of the verdict, must be accepted, that the car stopped at a usual stopping point, and that Mrs. McIlwaine, in the exercise of due care, got on the platform for the purpose of taking passage. This would make her a passenger, and

having become such, she must be so considered until she had alighted from the car in safety.

Judgment affirmed.

Crow, C. J., Ellis, Main, and Fullerton, JJ., concur.

[No. 10685. Department Two. February 19, 1913.]

MARIE D. METZ, *Respondent*, v. POSTAL TELEGRAPH CABLE
COMPANY, *Appellant*, WASHINGTON WATER POWER
COMPANY, *Defendant*.¹

ELECTRICITY—NEGLIGENCE—EVIDENCE—SUFFICIENCY. It is negligence on the part of a telegraph company for its employees in making repairs to cause a break in the lines and contact with high tension wires of a power company, the wires dropping to the ground and coming in contact with a wire fence, and to go away and leave it in its dangerous condition without notifying persons in the vicinity.

SAME—NEGLIGENCE—PROXIMATE CAUSE OF ACCIDENT. In such case, the telegraph company is not relieved of liability by the fact that the power company, after notice of trouble, through its automatic circuit breaker, turned on the current at intervals, according to the usual custom, in order to locate the trouble, where the telegraph company did not notify it of the actual trouble and should have anticipated the action of the power company.

APPEAL AND ERROR—HARMLESS ERROR—NOT AFFECTING APPELLANT. In an action for damages by reason of negligence, against two joint tortfeasors, jointly and severally liable, error in granting a nonsuit as to one is not error of which the other can complain.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered February 23, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through contact with an electric current. Affirmed.

Morrill, Chester & Skuse, for appellant.

Lloyd E. Gandy and *Fred J. Cunningham*, for respondent.

¹Reported in 130 Pac. 343.

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Opinion Per FULLERTON, J.

FULLERTON, J.—The respondent was injured by coming in contact with an electric current escaping from the wires of the defendant Washington Water Power Company, due to a break in such wire caused by the appellant Postal Telegraph Cable Company, and brought this action against both companies to recover therefor. On the trial, at the conclusion of the respondent's case in chief, the court sustained a challenge to the sufficiency of the evidence interposed by the Washington Water Power Company, and granted a judgment in its favor. The trial was then continued against the Postal Telegraph Cable Company, and resulted in a verdict against it and in favor of the respondent in the sum of \$2,500. From the judgment entered on the verdict, the Postal Telegraph Cable Company appeals.

The facts are not seriously in dispute. The defendant Washington Water Power Company owns and operates an electric railway running between the cities of Spokane and Cheney, in Spokane county. The electric current for operating its cars is carried on a high tension wire suspended above the railway track from projecting arms fastened to poles set alongside the track. The appellant, Postal Telegraph Cable Company, maintains a system of telegraph wires between the cities named. Its wires follow the common highways and are suspended from poles set along the margin of the highway. At a point called Reitmeier Station, the highway crosses the railway track, and at that place the telegraph wires cross the track and high tension wire of the railway company some few feet above the wire. It seems that the guards intended to keep the telegraph wires from coming into contact with the railway high tension wire got out of repair at this crossing and the appellant sent certain of its employees to readjust it. In the performance of the work the employees allowed a rope to come into contact with the high tension wire. The rope in some manner formed a point of resistance to, or short circuited, the electric current, causing the wire to burn and sever at the point of contact. The re-

spondent lived at the home of her brother-in-law a short distance from the road crossing. The home was inclosed with a wire fence. The ends of the high tension wire, after the severance, dropped to the ground, and one end came into contact with the wire fence, charging the wires composing the fence with electricity. This caused a fire to break out in a pine tree to which the wire fence was fastened, and the respondent seeing the fire, sought to quench it by throwing a bucket of water thereon. In doing so she came into contact with the electric current, receiving a severe shock and some painful burns, causing the injuries for which she sues.

The employees of the appellant, after breaking the high tension wire, did not notify any one of the break or of the dangerous condition in which it was left, not even their home office, but immediately gathered up their working tools and left the place. The fact that there was "trouble" on the high tension wire was made known at a power station of the power company shortly after the severance of the wire, by means of an appliance known as a "circuit breaker," which automatically shut off the electric current from the wire. It did not, however, make known the precise nature of the trouble, and to ascertain whether it was of a permanent or temporary nature, the company turned the current back onto the wire three distinct times at intervals of practically twenty minutes each, letting it remain there until the circuit breaker would again cut it off; periods of time ranging from five to seven seconds.

As grounds for reversal, the appellant urges that the court erred in denying its motion for a nonsuit, and sustaining a like motion on the part of its codefendant, The Washington Water Power Company. But we think it manifest there was no error in the ruling of the court, in so far as it related to the motion of the appellant. It was negligence on the part of the appellant's employees to cause the line to break in the first instance, and gross negligence to go away and leave it in its dangerous condition; especially as they failed to

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notify either their employer or the railway company of the fact of the break, or to notify the persons living in the vicinity of the place of the break the dangers likely to be encountered because thereof. As an employer is liable to third persons for injuries caused by the negligent acts of his employees, so the appellant is in this instance responsible to the respondent for her injuries, if the negligence of its employees was the proximate cause thereof.

The appellant contends, however, that the negligence of its employees was not the proximate cause of the injury to the respondent, but that such proximate cause was the turning back of the electric current onto the line by the power company after it had been shut off by the automatic circuit breaker. And it argues that for this act the power company was alone responsible; that it turned the current on after it had knowledge of trouble on the line, and of the dangers likely to be caused thereby, and must be held to have assumed the risk of all such dangers. But the contention is not tenable. Since the appellant originated the trouble, it owed a primary duty to notify the power company thereof. This it did not do, and hence is responsible to third persons for any injury caused by this neglect of duty, and we think it too much to assume that the power company would have turned the current back onto the line had it known of the actual conditions. Again, the evidence tended to show that the power company in turning the electric current back onto the line in the manner in which it did turn it back acted according to its usual custom in such cases; a custom also common and usual with all companies transmitting power by electricity. This being so, the appellant was bound to take notice of such custom and take such action as was within its power to prevent injury thereby. Moreover, we think that the employees of the appellant as reasonably prudent persons should have anticipated that the power company would test out the line by turning the electric current back thereon before making a search along its entire length to locate the

trouble, and that it was negligence on their part not to anticipate such a cause and guard against injury therefrom.

The second part of the objection, namely, that the court erred in granting a nonsuit in favor of the Washington Water Power Company, is not an error, if it be error at all, of which the appellant can avail itself. If the power company was guilty of negligence contributing to the injury of the respondent it was a joint tortfeasor with the appellant, and both companies were liable, severally and jointly, to the respondent for the entire injury suffered by her. And this being true, the nonsuit of the power company gives the appellant no cause of complaint, however erroneous the order might be when viewed from the appellant's standpoint.

Errors are assigned on the instructions of the court to the jury, but as they merely suggest in a different form the questions already discussed, they require no separate consideration.

The judgment is affirmed.

MOUNT, MORRIS, MAIN, and ELLIS, JJ., concur.

[No. 10675. Department Two. February 21, 1913.]

VITTUCCI IMPORTING COMPANY, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.¹

MUNICIPAL CORPORATIONS—SEWERS—DAMAGES FROM OBSTRUCTION—NEGLIGENCE. A city is not liable for damages to property through the obstruction of a sewer unless negligence on its part be proven.

SAME—DUTY OF INSPECTION. A city owes the duty of reasonable inspection of its sewers, and its liability for damages to property by reason of obstructions does not depend upon notice to it by the property owner.

SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The fact that a city sewer became obstructed, and overflowed and caused damage to property, and that there existed no extraordinary conditions such

¹Reported in 130 Pac. 109.

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Opinion Per MAIN, J.

as floods or freshets, establishes a *prima facie* case of negligence against the city, and casts the burden on it of showing that it had exercised ordinary care in performing its duty of inspection.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 25, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

James E. Bradford and *C. B. White*, for appellant.

John E. Ryan and *Grover E. Desmond*, for respondent.

MAIN, J.—This is an action for damages to personal property. The appellant, the city of Seattle, is a municipal corporation of the first class. The respondent, the Vittucci Importing Company, is a private corporation, organized and existing under the laws of the state of Washington. At a certain point in the city of Seattle, Jackson street and Occidental avenue, both public thoroughfares, intersect at right angles. A sewer system is maintained and controlled by the city. In the center of Jackson street is laid a main sewer twenty inches in diameter. Radiating from this main sewer are lateral sewers for the accommodation of the adjacent property. At the southeast corner of these two streets stands a building which is devoted to wholesale purposes. In this building respondent occupied store room No. 406, fronting on Occidental avenue, and the basement thereunder. An adjacent store room and basement were occupied by the Miller Furnace Company. Between the two basements there stood a board partition. The respondent was engaged in the wholesale grocery business, and had stored in the basement occupied by it a certain quantity of merchandise.

On October 24, 1911, the main sewer, at a point a short distance west of the intersection of Jackson street and Occidental avenue, became obstructed. This arrested the flow of sewage and caused it to set back and pass up the lateral used for the accommodation of the building a part of which respond-

ents occupied, thence into the basement occupied by the Miller Furnace Company, and from there through the wooden partition into the basement occupied by the respondent, and caused damage to the amount of \$594.83. Thereafter, and within the required time, the respondent presented its claim for damages for this amount to the city of Seattle. This being rejected, suit was instituted. The cause was tried to the court and a jury. Upon the trial the respondent, after making certain preliminary proof, introduced evidence showing the obstruction of the sewer, the amount of the consequent damages, and that there had been no extraordinary conditions such as excessive rains or freshets which could have caused the obstruction; but did not introduce any evidence showing failure of a reasonable inspection on the part of the city or notice thereto of the obstruction. The appellant challenged the legal sufficiency of this evidence and moved for a dismissal of the action, which was denied. Thereupon the appellant introduced certain evidence, but did not controvert the facts above indicated as established by the respondent. Neither did it introduce any evidence showing inspection of the sewer prior to the injury. At the conclusion of the evidence, the appellant moved for a directed verdict. This was overruled. Thereupon the respondent moved for a directed verdict, which was granted. Motion for judgment notwithstanding the verdict, and motion for a new trial, being seasonably made and overruled, an appeal was taken to this court.

The record in the case presents three questions: (1) what is the measure of the city's duty in keeping its sewers in repair and free from obstructions; (2) is notice an essential element of liability; and (3) do the facts established make a *prima facie* showing of negligence.

As to the measure of duty, it is well settled that a municipal corporation is not an insurer of the condition of its sewers, and that, to charge it with damages occasioned by an obstruction therein, negligence must be proven. This proposi-

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tion is not controverted. It is so well known as not to require the citation of authority in its support.

On the second question, that of notice, the authorities are not harmonious. Numerically speaking, the weight of authority appears to be to the effect that notice, either actual or constructive, is an essential element upon which to predicate liability. The opposite view, however, is supported by very respectable authority, and seems to be sound in reason. The sewers are constructed and maintained by the city, and are under its exclusive control. It is the city's duty to exercise ordinary care in causing an inspection of them from time to time, in order that needed repairs may be made therein and obstructions removed therefrom. The individual whose property may be subjected to destruction by a defective sewer has neither the duty nor the right of inspection; neither does he have the authority to repair. The first knowledge that he has or can have that an obstruction exists in the sewer is when his property suffers damage which is caused thereby. There appears to be no good reason why the city should be entitled to notice, either actual or constructive, of a defect or obstruction in one of its sewers as a necessary element of liability, when such defect or obstruction is such that it would have been discovered by reasonable inspection. Manifestly, the liability of a municipal corporation for defects or obstructions in its sewers should be measured by a different rule from that which applies to defects or obstructions on its streets or sidewalks. *McCarthy v. Syracuse*, 46 N. Y. 194; *Vanderslice v. Philadelphia*, 103 Pa. St. 102.

The former case states the principle as follows:

"The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair, is not performed, by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition, from

time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated, and could be guarded against by occasional examination and cleansing, the omission to make such examination and to keep the sewers clear, is a neglect of duty which renders the city liable."

The third inquiry is, Do the facts above stated make a *prima facie* showing of negligence on the part of the appellant? These facts establish, (1) the obstruction; (2) the amount of consequential damage to the respondent's property; and (3) that there existed no extraordinary conditions, such as excessive floods or freshets, that could have overloaded the sewer and thereby caused the obstruction. It is argued that these three elements presumptively establish negligence, and cast upon the appellant the burden of showing that it had exercised ordinary care in performing its duty of inspection. We think these facts make a *prima facie* showing of negligence, and cast upon the appellant the duty of showing that reasonable inspection had been made. Had the appellant met this burden and by competent evidence established that it had exercised ordinary care in the matter of inspection, this would have been a complete defense to the action. The city could not be held liable for defects or obstructions which a reasonable inspection would not have discovered. Whether or not there had been an inspection was a fact peculiarly within the knowledge of the appellant, and it would be an unreasonable rule that would require a citizen, as a necessary element of his cause of action in cases of this character, to establish by affirmative evidence the nonexistence of a fact of which he did not have knowledge and which in many cases he would be unable to ascertain and which is entirely within the knowledge of the city. If there had been an inspection, the city knew it and it should have met the *prima facie* case by showing that fact. There is nothing in the opinion in *Hayes*

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v. Vancouver, 61 Wash. 536, 112 Pac. 498, which is *stare decisis* as against the conclusions here reached.

There being no dispute as to the amount of the damage, and the appellant having introduced no evidence to meet the presumptive showing of negligence on the part of the respondent, the trial court did not commit reversible error in sustaining the motion for a directed verdict.

The judgment will therefore be affirmed.

MOUNT, ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 10677. Department One. February 21, 1918.]

C. H. SAEGER *et al.*, *Respondents*, v. C. C. BALDWIN,
Appellant.¹

HIGHWAYS — ESTABLISHMENT — PRESCRIPTION — EXPENDITURE OF PUBLIC FUNDS—EVIDENCE—SUFFICIENCY. Use of a private way granted to neighbors, who had no other access to the public road, does not create a public highway by prescription, nor under Rem. & Bal. Code, § 5657, making such roads public highways when they have been "worked and kept up at the expense of the public" for seven years, where it appears that for eleven years the way had been used exclusively for the convenience of one owner, a gate had been maintained across it, and not exceeding \$20 or \$25 of public funds had been expended on it during fourteen years.

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered May 8, 1912, upon findings in favor of the plaintiffs, in an action to restrain trespass. Affirmed.

Marion Garland and *Troy & Sturdevant*, for appellant.

T. P. Fisk, for respondents.

PARKER, J.—The plaintiffs seek to have the defendant enjoined from trespassing upon their land by passing over it on what he claims to be a public highway. A trial upon the

¹Reported in 130 Pac. 114.

merits resulted in judgment in favor of the plaintiffs as prayed for, from which the defendant has appealed.

For a period of some fourteen years prior to the commencement of this action, respondents had been the owners of a forty-acre tract of land, along the north line of which runs a county road. Appellant owns a forty-acre tract of land adjoining respondents' land upon the south, which he has owned for about eleven years. Prior to about fourteen years ago, a road ran across the land now owned by appellant, in an easterly and westerly direction, which road was abandoned upon the establishment of the county road to the north of respondents' land. Shortly after the abandonment of the old road and the establishment of the new one, respondents consented that two of their neighbors to the south, a Mr. Elison and a Mr. Barger, could use a roadway over their land to reach the new county road on the north. Respondent C. H. Saeger testified as to this agreement or understanding with his two neighbors as follows:

"After the county road was moved north of my place, Mr. Barger, who lived south of Elison's place had no road. I made an agreement with him and Mr. Elison that a private road should be made across my land and across Elison's land for the use of Barger and Elison. It was understood that it was to be a private road. After the road was fixed so as to be used, Elison fenced up the part on his land and would not let Barger out over him and I then refused to let Elison use the road over my land. It was agreed that the old road should be used until I should fence and clear my land and that then I would give a lane along the west side of my land."

The road was opened and improved sufficient for use by these neighbors near the west line of respondents' land, being in some places as much as eighty feet therefrom. Thereafter, some ten or eleven years before the commencement of this action, appellant commenced to use this road; and thereafter, but evidently long before the commencement of this action, Elison and Barger, who had acquired egress to a county road upon the west from their places, ceased the use of the

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road here in question. This resulted in no one except appellant having any special interest in the use of this road. Appellant continued to use it until a short time before the commencement of this action, when it was closed by respondents' building a fence across it, and it is to prevent appellant's interference with the fence and the continued use of the road that this action was commenced.

For many years prior to the commencement of this action, the road was used practically exclusively for travel to and from appellant's place. This, in any event, was true after Elison and Barger ceased to use it. Respondents caused a gate to be maintained across the road, for a period of time which was less than seven years prior to the commencement of this action. Some small amount of work was done upon this road at the expense of the county. Without attempting to state in detail the evidence on this subject, we deem it sufficient to say that, during the entire period from the commencement of the use of it by Elison and Barger up until the time of the commencement of this action, the expenditure made by the county upon it, including the alleged working out of some poll tax, in no event exceeded \$20 or \$25, and even this expenditure, at least in considerable part, was based upon very doubtful authorization by the proper authorities of the county. The evidence also tends to show that the county has in recent years refused to recognize it as a public highway.

Counsel for appellant rest the right to have this road kept open for travel upon the theory that it is a public highway; that is, that it has been created such by prescription, and also by the use and maintenance thereof by expenditure of public funds thereon for seven years under § 5657, Rem. & Bal. Code. We are of the opinion that neither of these contentions can be successfully maintained. The seven-year statute relied upon makes such roads public highways only when they "have been worked and kept up at the expense of the public" for a period of not less than seven years. It

seems clear to us that, even conceding that public money has been expended upon this road to the extent claimed, it would not be sufficient to create it a public highway. It is suggested that in any event § 5657 is not prospective in its effect, but only relates to roads which had public money expended upon them in their maintenance prior to the passage of that section. We find it unnecessary, however, to decide that question. Nor do we think the public use of this road has been such as to create it a public highway by prescription. In the case of *Megrath v. Nickerson*, 24 Wash. 235, 64 Pac. 168, we held that, "to establish a highway by prescription there must be an actual public use, general, uninterrupted and continuous, under claim of right, for the term of years necessary to establish the right." It seems clear to us there has been no such use here shown.

The judgment is affirmed.

MOUNT, MAIN, GOSE, and CHADWICK, JJ., concur.

[No. 10796. Department Two. February 21, 1913.]

F. H. BARDSHAR, *Appellant*, v. SEATTLE ELECTRIC COMPANY,
Respondent.¹

STREET RAILROADS—ACCIDENT AT CROSSING—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE OF DRIVER—EVIDENCE—SUFFICIENCY. A chauffeur, whose car was hit by an electric car at a city crossing, as he started to cross the tracks behind another electric car discharging passengers on a parallel track, is guilty of contributory negligence, precluding any recovery, where his view on approaching the crossing was unobstructed for a distance of eight blocks, and he could have seen the approaching car if he had looked for it, but he failed to do so when he had the opportunity, and undertook to cross the track from behind the standing car where his view was obstructed without having observed the other car.

Appeal from a judgment of the superior court for King county, Main, J., entered June 27, 1912, dismissing an action in tort, upon granting a nonsuit. Affirmed.

¹Reported in 130 Pac. 101.

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Opinion Per MORRIS, J.

Willet & Oleson, for appellant.

James B. Howe and *A. J. Falknor*, for respondent.

MORRIS, J.—Appellant seeks to recover for damages to his automobile, resulting from a collision with one of respondent's street cars at First avenue and Union street, Seattle, about 8:30 p. m. September 13, 1910, and takes this appeal from a judgment of nonsuit, based upon the contributory negligence of the chauffeur.

The automobile was proceeding south on First avenue from Pike street, approaching Union street, one block to the south; it was passed by one of respondent's cars on the west or south-bound track. This south-bound car stopped on the south side of Union street to take on awaiting passengers. The chauffeur, desiring to cross First avenue at Union street, slowed down his automobile, and drove on behind the south-bound car, reaching Union street. He made the turn to the east as required by an ordinance of the city by going to the south of the street intersection. At this point he was behind the standing car a distance variously estimated by appellant's witnesses from fifteen to thirty feet. As the front wheels of the automobile ran onto the west rail of the east or north-bound track, it was hit by a car coming north, and received the damage complained of. The chauffeur testified that, from the time the south-bound car passed him in the middle of the block between Pike and Union, there was no car ahead of him, and nothing to obstruct his view, and that he could see down First avenue as far as Pioneer Square, some eight blocks away. His examination then continues:

"Q. How many cars did you see coming? A. I didn't look down that way. Q. You didn't look to see if there were any cars coming? A. No, I did not. Q. You did not observe whether there were any cars coming? A. No. Q. If you had looked you could have seen this car coming? A. I suppose so, . . . Q. Now you say that you were fifteen or twenty feet something like that, from the car that was standing still? A. The south-bound car? Q. Yes, was it

standing still when you started to go across? A. Yes. Q. And it blanketed your view? A. Down First avenue? Q. Yes. A. Yes. Q. Now you knew that the cars frequently operated up and down those tracks? A. Yes, I knew that. Q. And that the out-bound car came on the opposite track? A. Yes. Q. How far is it between the in-bound track and the out-bound track; four or five feet, isn't it? A. Yes, about that. Q. The front of your machine then if you made a right angle turn and was crossing directly up Union street, would be on the up-bound track before you could see down First avenue around the standing car? A. Yes."

Upon these facts, and others of similar import testified to by the chauffeur and the other occupants of the automobile, we think the lower court was right in holding they established contributory negligence. Much is said in appellant's brief about the rule of look and listen as applied to street car crossings, and the oft declared rule of this court that failure to do so is not *per se* negligence in law. Our position as to the proper application of this rule in cases of this character has been fully set forth in *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, and other cases there cited, and it is not necessary to again discuss it. We there said, after stating our view, that failure to look and listen before crossing the tracks of an electric railway in a public street was not negligence *per se*:

"But such a rule does not mean that one can heedlessly and carelessly cross the track without using his senses for his protection; nor does it mean that those who have eyes to see but see not and ears to hear but hear not, are exercising due care. In determining the question of contributory negligence, due care or ordinary prudence is the only known test. What would be due care under certain circumstances would not be due care under other and different circumstances; and in determining this question this court has refused to predicate its answer alone upon the fact that it did not appear that the person about to cross the track looked or listened, and say such failure of itself alone constitutes negligence in law. Other facts existing and present and affecting the situation must be given their due weight in determin-

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ing the question of contributory negligence. In other words, it is not alone, Did the pedestrian look and listen? and upon answering that question in the negative, say it is negligence *per se*, and there can be no recovery. But the test is, did the pedestrian, under all the circumstances, use such a degree of care, caution, and prudence as an ordinary, prudent and careful pedestrian would use under like circumstances; and in answering such test, this court has in a number of cases held that the failure to look and listen was a fact to be considered in determining whether or no there was contributory negligence as a matter of law. *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Mey v. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657. The same rule has been applied to the drivers of wagons in crossing the track. *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Coeur d'Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839; *Helber v. Spokane St. R. Co.*, 22 Wash. 319, 61 Pac. 40."

Other jurisdictions, adopting the same rule that such failure is not negligence *per se*, have made the same application of it as we have in the *Helliesen* case. *Denis v. Lewiston, B. & B. St. R. Co.*, 104 Me. 39, 70 Atl. 1047, and cases there cited; *Terien v. St. Paul City R. Co.*, 70 Minn. 532, 73 N. W. 412. These cases dispose of appellant's contention that, upon this point, the judgment cannot be sustained. If appellant could escape the effect of the legal principles upon which these cases are based, he would be met by the rule lately announced in *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058, where it was held that one who passes behind a standing street car where there is a parallel track, without using his senses for his own protection and safety is guilty of contributory negligence. Upon principle the two cases cannot be distinguished. It was there said:

"The same rule obtains where the traveler takes observation from a point where he knows that his view is restricted and then heedlessly passes into the zone of danger."

This language is peculiarly applicable to the facts in this case, in view of the testimony of the chauffeur that from the time when the down car passed him it "blanketed" his view down the street, and that without taking any observation or precaution to ascertain whether or not a car was approaching upon the up track, he drove his machine upon the rails. Other points are discussed in the briefs, but they are not material upon the point presented by the ruling complained of, since that involves only the contributory negligence of the chauffeur.

The judgment is affirmed.

Crow, C. J., Mount, Ellis, and Fullerton, JJ., concur.

[No. 10818. Department One. February 21, 1913.]

MARY P. BULLOCK, *Respondent*, v. FRANK M. STANLEY *et al.*,
Appellants.¹

EVIDENCE—LOST WRITING—PAROL EVIDENCE. Parol testimony to prove a written assignment of an account which had been lost is admissible, where it appears that plaintiffs claimed through a written assignment from a copartnership, that the assignment in question had theretofore been made to the copartnership upon a change in the firm membership, and that three years had elapsed since the first assignment had been made.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 29, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Carkeek, McDonald & Kapp, for appellants.

Elias A. Wright, for respondent.

PER CURIAM.—This is a suit upon an assigned account. There was a verdict and judgment for the plaintiff. The defendants have appealed.

¹Reported in 130 Pac. 95.

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The appeal presents two questions. The first contention is that the evidence of the indebtedness is insufficient to support the verdict. This contention is wholly wanting in merit. The verdict has substantial evidence to sustain it, and the question of the weight of the evidence was one for the jury.

The respondent claims through an assignment made by P. S. Combs & Co., a copartnership. The assignment is in writing and was put in evidence. Upon the trial it was shown, that, prior to the date of the assignment, P. S. Combs had purchased the interest of his copartners in the business, including the account in controversy; that they had retired; that he had taken his son into the copartnership; and that the partnership at the date of the assignment was composed of P. S. Combs and his son. Combs testified that this assignment was also in writing. The writing was not produced, and the admission of the parol testimony to prove the assignment is the second error assigned. It is contended that its absence was not sufficiently accounted for. Considering the time that had elapsed between the date of the first assignment and the trial, which was nearly three years, we think the evidence offered as to the loss of the assignment was sufficient to admit parol testimony.

The judgment is affirmed.

[No. 10871. Department Two. February 21, 1913.]

PAUL F. MATHIS, *Respondent*, v. WESTERN FURNITURE
MANUFACTURING COMPANY, *Appellant*.¹

EVIDENCE—DEMAND OF COPY OF WRITING PLEADED—MASTER AND SERVANT—NOTICE UNDER FACTORY ACT—PROOF. Rem. & Bal. Code, § 284, providing that it shall not be necessary to plead a copy of an instrument of writing or the items of an account alleged but precluding evidence thereof if the copy be not furnished upon demand, has no application to a copy of the notice of the time, place, and injury required by the factory act to be given to an employer upon an injury to a servant on unguarded machinery, which is merely a condition precedent to action, and not the basis of the liability.

MASTER AND SERVANT—INJURY TO SERVANT—UNGUARDED SAW—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE. Contributory negligence is not the proximate cause of an injury sustained on a saw which was not guarded as required by the factory act, where the plaintiff was operating the saw in the usual manner and would not have been injured if it had been properly guarded.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. Damages in the sum of \$3,250, for a painful cut of a thumb, lacerating the flesh, injuring the bone and resulting in a stiff thumb and partial loss of use, are excessive and should be reduced to \$1,000.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 27, 1912, upon findings in favor of the plaintiff, in an action for personal injuries sustained by an operator of a planer, after a trial to the court. Modified.

Ballinger, Battle, Hulbert & Shorts, for appellant.

MORRIS, J.—Action under the factory act to recover damages for injury alleged to have been sustained because of appellant's failure to guard a jointer or buzz-planer.

The appeal presents three questions. It is first urged that respondent was precluded from giving evidence of the service of the notice required by the act, because he did not serve a copy thereof upon appellant's attorneys within ten

¹Reported in 130 Pac. 94.

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days after demand for same. In support of this claim of error, appellant relies upon the provisions of § 284, Rem. & Bal. Code, reading as follows:

"It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further account, when the one delivered is defective; and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished."

This section has no application to actions brought under the factory act. Its manifest purpose is to embrace cases where the action is founded upon a written instrument or items of an account are put in issue. The notice required by the factory act to be given of the time, place and cause of injury complained of is not an instrument in writing within the meaning of § 284. The right of action does not accrue upon the notice, but on the failure to properly guard. The giving of notice is simply a condition precedent to the commencement of action, while the written instrument or items of an account referred to in § 284 embrace the right of action itself and not any precedent condition to the right to commence suit. The object of the statute requiring the service of a copy of a written instrument or items of an account is to enable the defendant to protect himself against surprise on the trial. *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. 883. This object is fully complied with when the notice required by the factory act is served. That it was served in this instance can hardly be doubted.

It is next urged that respondent's contributory negligence, and not the failure to guard the knives of the jointer,

was the proximate cause of the injury; citing *Laidley v. Musser Lumber & Mfg. Co.*, 45 Wash. 239, 88 Pac. 124, where it was held there could be no recovery for injuries sustained by an experienced sawyer by reason of his contributory negligence where he attempted to pull a piece of lumber out of a clogged up chute and gave it a jerk, causing it to suddenly give way and bring his arm in contact with a moving saw. The cases are not at all similar; in the *Laidley* case, it was not the failure to guard the saw that caused the injury, but the negligent act of shoving the arm into the clogged chute and jerking the arm up against the saw. Had the plaintiff in that case been operating his machine in the usual manner, he would not have been injured. In this case, respondent was injured while operating the machine in the usual manner, and received an injury which, had the machine been properly guarded, could not have happened. There is a plain distinction between the two cases.

The last contention is error in the assessment of damages. The case was tried by the court without a jury, and \$3,250 awarded as damages. This amount is said to be excessive for the injury sustained. The injury was the cutting of the thumb on the right hand, lacerating the flesh and so injuring the bone that the result is a stiff thumb down to the first joint. We have no doubt the injury was a painful one, and that respondent will be handicapped because of his stiffened joint, resulting in a partial loss of the use of the thumb. Such an injury, however, does not warrant a judgment of \$3,250. What would be a proper sum is difficult of ascertainment, and for this reason appellate courts on such an assignment of error give great weight to the verdict of a jury or the findings of a court. It is, however, as much our duty to set aside such a verdict or finding when we believe it to be unjust, as it is to give heed to any other prejudicial error, and we cannot escape this duty much as we dislike it. This award seems to us unreasonable and unjust, and respondent must accept a reduction to the sum of \$1,000 or submit to a new trial.

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If within twenty days from the going down of the remittitur respondent accept such a reduction the judgment so modified will stand, otherwise a new trial is ordered. The other assignments of error are overruled and as so modified the judgment will stand.

Crow, C. J., Main, Ellis, and Fullerton, JJ., concur.

[No. 10938. Department Two. February 21, 1913.]

RAYMOND COMPANY, *Appellant*, v. LITTLE FALLS FIRE CLAY COMPANY, *Respondent*.¹

APPEAL—NOTICE OF APPEAL—PARTIES ENTITLED TO NOTICE—NECESSARY PARTIES. Upon appeal from a judgment disallowing a claim against an insolvent, and directing a sale of assets, the principal creditor instituting the receivership proceedings, and a party to the action, is a necessary party to the appeal; as is, also, the purchaser at the receiver's sale; and where notice of appeal was not served on them, the appeal must be dismissed.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 26, 1912, directing a receiver's sale of the assets of an insolvent company, upon disallowing petitioner's claim against the insolvent. Appeal dismissed.

Rickabaugh & McElroy, for appellant.

Hayden & Langhorne and *E. R. York*, for respondent Dimmock, Receiver of Little Falls Fire Clay Company.

MORRIS, J.—The respondent, in a suit instituted by the West Coast Grocery Company, was decreed insolvent, and a receiver was appointed. Appellant appeared in this proceeding and filed a petition, praying that the receiver be restrained from disposing of a patented brick kiln which it was claimed the insolvent company had constructed under a license, as embodied in a contract the terms of which had not

¹Reported in 130 Pac. 93.

been complied with; or in the alternative, that the receiver be directed to pay appellant \$2,000, the amount of the license it claimed due under the contract. The court denied the petition and directed the sale of the kiln with other assets of the insolvent company, from which order C. W. Raymond Company appeals.

Motion is made to dismiss the appeal, upon the ground that necessary and interested parties were not served with notice. This motion must be granted. The parties upon whom respondent contends notice should have been served are the West Coast Grocery Company, a large creditor of the insolvent company, and plaintiff in the proceedings in which the receiver was appointed, and the Standard Clay Company, the purchaser at the receiver's sale of the property and assets of the insolvent company. Under the decree of the court, the appellant shares in the insolvent estate as a general creditor. It contends, and if its appeal were here sustained, it would be held, that under its contract of license the receiver must pay it the sum of \$2,000, thus depleting the fund upon which the West Coast Grocery Company looks for a payment of the amount due it from the insolvent company. The West Coast Grocery Company is, therefore, not only a party to the action, but has substantial interests involved in the decree, and affected by this appeal. It was therefore entitled to service of the notice of appeal, as a party to the action whose interests were to be determined by the appeal. Whether this would require service of notice of the appeal in a receivership proceeding upon creditors who are not parties to the action, but have only filed claims with the receiver, is not here determined, as that question is not involved in this ruling.

The Standard Clay Company, by becoming a purchaser at the receiver's sale, voluntarily submitted itself to the jurisdiction of the court, and thus became a party to the action. *Rice v. Ahlman*, 70 Wash. 12, 126 Pac. 66; *Robertson Mtg. Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312. In the last case it was held that a purchaser at a sheriff's sale acquires sub-

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stantial interests in the property involved in the appeal, and is entitled to service of notice. These two cases are controlling as to the Standard Clay Company's right to notice.

The appeal is dismissed.

CROW, C. J., MAIN, FULLERTON, and ELLIS, JJ., concur.

[No. 10686. Department Two. February 21, 1913.]

JOHN A. J. SCHMIDT *et al.*, *Appellants*, v. F. M. CURTISS
et al., *Respondents*.¹

ATTORNEY AND CLIENT—EMPLOYMENT—CONTRACTS—RETAINER FEE. Where a contract for the employment of attorneys provided that \$1,000 be paid as a retainer fee, out of which the attorneys were to pay all expenses of the case, and that at the end of the litigation, they should be paid the reasonable value of their services, no part of the retainer need be returned where other attorneys were substituted before the end of the litigation.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 7, 1912, ordering a substitution of attorneys and refusing to order the return of a retainer. Affirmed.

R. L. Edmiston and *R. M. Webster*, for appellants.

Merritt, Oswald & Merritt, for respondents.

MOUNT, J.—This proceeding was brought in the lower court by the appellants, to substitute attorneys of record, and to require the attorneys previously employed to return to appellants \$800 paid to them. The trial court, by consent of the parties, ordered the substitution, but, after a hearing upon the merits, refused to order a return of the money paid as a retainer. This appeal followed.

¹Reported in 130 Pac. 89.

It appears that the appellants and the respondents, in May, 1912, entered into a written contract as follows:

"This memorandum of agreement, made and entered into between John A. J. Schmidt and the firm of Curtiss & Remele, all parties of Spokane, Washington, witnesseth:

"Whereas the said John A. J. Schmidt desired to secure the services of Curtiss & Remele in the matter of commencing certain suit against the Cook-Reynolds Company of Lewiston, Montana, to set aside a certain deed to real property situated in Spokane, and to recover the value of a \$5,000 real estate mortgage which he has recently assigned to them, all in consideration for a contract on the part of the Cook-Reynolds Company to convey to him certain premises situated in the state of Montana; and

"Whereas the said John A. J. Schmidt claims that he has been defrauded by said Cook-Reynolds Company out of his premises in Spokane and his mortgage and in addition a \$200 cash payment;

"Now, therefore, in consideration of the services of said Curtiss & Remele, he thereby agrees to and does pay to them the sum of one thousand dollars, the receipt whereof is hereby acknowledged, which sum is accepted by Curtiss & Remele on the understanding that it is a retainer fee in said case, out of which sum they agree to pay the cost of litigation in the superior court, their expenses and the expense of Mr. Schmidt on a trip to Montana for the purpose of investigating conditions there pertaining to said case and looking up testimony which will be necessary to be taken in that state, and it is also further agreed that when said litigation is ended, a final settlement shall be had between the parties and Curtiss & Remele paid the reasonable value of their services in said litigation."

Thereafter the plaintiff paid to respondents \$1,000, and respondents brought the action agreed upon. Pursuant to the contract, Mr. Remele went from Spokane to Montana in order to obtain the facts in the case. Thereafter this proceeding was begun, the appellants alleging that the contract was void on account of fraud practiced upon the appellants, who did not understand the terms of the contract. This issue was tried to the court, and a finding was made that "the contract between Curtiss & Remele and said J. A. J. Schmidt is valid,

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and that there was no fraud, overreaching, or undue influence of any kind whatsoever practiced by Curtiss & Remele in the procurement of said contract.”

It is contended by appellants that this finding is not in accord with the evidence, and that the contract itself shows that the \$1,000 paid was in full for services during the litigation. We are satisfied that the finding is fully sustained by the evidence. The great preponderance thereof is to that effect.

Appellants also contend that the contract upon its face shows that the \$1,000 was in full for the services to be rendered in the case, and that, when the respondents were discharged, they should account for the balance, after paying expenses and a reasonable fee for the work done by them. But such is not the provision of the contract, for it expressly provides that the \$1,000 was paid and received as a retainer fee, and that when the litigation is ended a final settlement shall be had between the parties, and respondents paid the reasonable value of their services. The meaning of a retainer fee is plain and well understood, and was explained to Mr. Schmidt at the time the contract was entered into. No part of this money was agreed to be returned to the appellants, and when the respondents were discharged they were, therefore, under no obligation to return any part of the retainer fee.

The judgment is affirmed.

FULLERTON, MORRIS, ELLIS, and MAIN, JJ., concur.

[No. 10369. Department Two. February 21, 1913.]

BLANCHE FRICK *et al.*, *Appellants*, v. WASHINGTON WATER
POWER COMPANY, *Respondent*.¹

DAMAGES—PERSONAL INJURIES—AGGRAVATION OF CONDITIONS—ISSUES—INSTRUCTIONS. In an action for personal injuries in which the plaintiff alleged, and her evidence tended to prove, that she "was a strong, able-bodied woman prior to the accident," which caused appendicitis and a retroverted womb, and necessitated surgical operations, and in which the sole defense was that, prior to the accident, she had appendicitis and retroverted womb, which were in no manner caused or affected by the accident, plaintiff was not entitled to an instruction that she could recover for any aggravation of a diseased condition known to her prior to the accident, since it was outside of the issues made by the pleadings and proof.

Appeal by plaintiff from a judgment of the superior court for Spokane county, Huneke, J., entered February 6, 1912, upon the verdict of a jury rendered in favor of the plaintiff for \$1,000, for personal injuries sustained by a passenger when a street car left the track. Affirmed.²

Graves, Kixer & Graves, for appellants.

Post, Avery & Higgins, for respondent.

MOUNT, J.—The plaintiffs brought this action to recover damages from the defendant, on account of alleged personal injuries sustained by Mrs. Frick when a passenger upon one of defendant's street cars. The complaint alleged that, about midnight on the evening of November 24, 1910, while the plaintiffs were passengers upon one of defendant's cars, said car was so negligently operated that it left the track and struck the sidewalk curb with such force that the plaintiff Mrs. Frick was violently hurled against the seat in front of her, striking her abdomen against the upright back of the seat, inflicting permanent internal injuries upon her, so that

¹Reported in 130 Pac. 98.

²Rehearing *En Banc* ordered.

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her appendix became inflamed and diseased and she suffered retroversion of the womb to such an extent that a surgical operation became necessary and was undergone for the removal of the appendix and for the restoration of the womb to its proper position, and as a result thereof said plaintiff was rendered sterile, and by reason thereof suffered and continued to suffer great pain and anguish; that, "prior to said accident, said plaintiff was a strong, able-bodied woman in good health." These allegations were all denied by the answer.

When the case came on for trial to the court and a jury, the defendant conceded, "that, if the plaintiff Blanche Frick received the specific injuries alleged in the complaint at the time and place there stated, that the defendant would be liable for reasonable damages on account thereof, but defendant denies that she received said injuries or any of them." The negligence of the defendant was thereby conceded; so that the only question left for the jury to determine was whether the plaintiff was injured at the time of the accident, and the extent of the injuries and the amount of damages. The case was tried out upon that question. The jury returned a verdict in favor of the plaintiffs for \$1,000. The plaintiffs thereafter moved the court for a new trial for errors of law occurring in the trial. This motion was denied and the judgment entered upon the verdict. The plaintiffs have appealed.

It is argued that the court erred in refusing to give certain instructions requested by the plaintiffs, and in giving certain other instructions. Defendant has moved to dismiss the appeal, for the reason that no proper exceptions were taken to these instructions. We think the exceptions taken were sufficient under the rule in *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202.

The plaintiffs requested the court to give the following instructions:

"If the jury believe from the evidence, that plaintiff Mrs. Frick was injured through the negligence of the defendant, and if the jury further concludes from the evidence that at

the time of such injury plaintiff Mrs. Frick was in a delicate condition of health, or possessed an organic predisposition to disease or injury, and that such injury augmented, aggravated and accelerated such diseased condition or ill-health, then your verdict will be for the plaintiff, unless you find that these conditions not only might have arisen even though the defendant had not been negligent, should you find it negligent in the premises. If one is reasonably responsible for the act, he is chargeable for the direct results of the act, however surprising. The rule is, if by reason of the delicate condition of health the consequences of a negligent act are more serious, still, for those consequences the defendant is liable, although they are aggravated by imperfect bodily conditions. The duty of due care and of abstaining from the unlawful injury of another, applies to the sick, to the physically frail or weak, and to the infirm, as fully as to the strong and healthy; and when the duty is violated, the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby. The proximate cause of an injury is the efficient cause; the one that necessarily sets the other cause in motion. The street cars of the defendant company are not operated for the sole use of healthy and robust people, but are for the use of the sick, the infirm and the decrepit as well. They may lawfully be patronized by every person, without regard to age, sex or physical condition, and the defendant company is chargeable with the knowledge that people of different bodily conditions travel on its cars, and that among these are the weak, the decrepit and those with organic predisposition to disease. It is reasonable to expect that in certain cases, if an injury happens to one of the latter class, full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease, and that such tendency to disease or predisposition may greatly aggravate a bodily injury. Thus, a street railway company has reasonable grounds to expect that if one of that class who are diseased or afflicted with a tendency to disease, is injured by reason of the negligent operation of its cars, the disease might develop and result in far more serious consequences to the injured person than would have resulted to a robust person. Hence, if you find that the plaintiff Mrs. Frick had a tendency to appendicitis or that her fallopian tubes were affected by

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disease and that she was injured as she alleges, and that such injury aggravated, augmented and accelerated her diseased physical condition, resulting in the necessity for the operations afterwards performed and the suffering occasioned thereby, then and in that case I charge you that the negligence of the defendant was the proximate cause of the injury for which plaintiff seeks to recover damages."

The court refused to give these requested instructions, but gave the following:

"From this statement you will see that the ultimate questions of fact for you to determine are therefore, first, whether or not the injuries of which Mrs. Frick complains, namely a diseased appendix and a retroverted womb were caused by the accident in question; and if you find that they were, then, second, what sum will fairly compensate her for such injuries.

. . . It is charged in the complaint in this case that one of the results of the accident referred to in the complaint so far as Mrs. Frick is concerned is the disease of appendicitis. It is claimed by the defendant that Mrs. Frick had appendicitis before this accident. It is alleged in the complaint that before the accident plaintiff was in all respects a strong and healthy woman. It is not alleged in the complaint that plaintiff had a chronic or catarrhal appendicitis, and that the accident aggravated the disease and produced a condition of acute appendicitis necessitating an operation. I charge you that if you find from the evidence that plaintiff Mrs. Frick had and suffered from a diseased appendix before and down to the accident, that then plaintiffs cannot recover in this action on account of their claim for appendicitis or the expense of the surgical operation therefor and you shall not allow the plaintiffs any damages on account of the claim of appendicitis or the surgical operation for appendicitis. It is charged in the complaint that one of the results of the accident referred to in the complaint was retroversion of the womb. It is claimed by the defendant that retroversion of the womb could not be caused by this accident; that if the plaintiff Mrs. Frick had retroversion of the womb she had it before this accident. If you find that Mrs. Frick had retroversion of the womb prior to the accident and that she knew thereof, then plaintiffs cannot recover in this action on account of their claim for a retroverted womb or the expense of the surgical operation

therefor, nor under the circumstances could plaintiffs recover if the accident aggravated the condition, since, if Mrs. Frick knew that she had a retroverted womb at and prior to the time of the accident then it was her duty to so allege and not allege that she was a perfectly sound and healthy woman. If, however, you find that Mrs. Frick had a retroverted womb at and prior to the time of the accident and she was ignorant thereof then before plaintiffs would be entitled to damages on that account they must show that the condition of retroversion was aggravated by the accident. If you find that she had a retroverted womb and that it was not aggravated by the accident, then plaintiffs will not be entitled to any damages on account of the retroverted womb or any expense attending and resulting from the operation of restoring it to its proper position. On the other hand, if she had a retroverted womb at and prior to the time of the accident and she was ignorant thereof and the accident aggravated the condition, causing her pain and distress, then plaintiffs would be entitled to damages for such aggravation. You must so far as you can separate the results of the infirmities of Mrs. Frick, if any, which existed before the accident from the results of the accident. It is only the accident and the natural results of the accident that you are to consider if you arrive at the question of damages in this case. If you find the fact to be that Mrs. Frick had retroversion of the womb before the accident and the same was aggravated by the accident, in considering the question of damages you are only to consider the aggravation and not the natural and probable consequences of the retroversion of the womb, which existed before the accident."

Substantially the same instructions were given with reference to the removal of the fallopian tubes. The court then instructed the jury:

"If in accordance with the instructions I have already given you you find for the plaintiffs, then I instruct you that plaintiff is entitled to recover for all loss of time, for all physical injuries and for all physical suffering that she has endured as the direct and proximate result of any injuries received by her as a result of such accident, and likewise, if you find from a preponderance of the evidence in the case that any injuries received by her are permanent in their nature, she is entitled to recover therefor. In addition thereto the plaintiffs

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are entitled to recover for any reasonable sums which they have necessarily expended for hospital bills, for nurses and surgeons in endeavoring to be cured of any hurts and injuries she received on account of said accident, and in this connection I instruct you that these items include any sums that plaintiffs may have incurred liability for, whether they have actually paid the same or not. You must bear in mind that if you find a verdict for the plaintiffs that your verdict must be compensatory, i. e., it must not exceed such amount as will fairly compensate plaintiffs in money for the injuries sustained."

The requested instructions first above quoted were taken substantially from the case of *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743, and afterwards approved by this court in *Short v. Spokane*, 41 Wash. 257, 83 Pac. 183. While they correctly state the law as applied to those cases, we are satisfied they are not applicable to this case, because here the issue was clearly presented by the pleading whether Mrs. Frick was a sound and healthy person prior to the injury, and the case was tried out to the jury upon that one issue. The plaintiffs sought to show by their evidence that Mrs. Frick prior to the accident was sound physically, while the sole defense was that she had a diseased appendix, diseased fallopian tubes, and a retroverted womb prior to the injury, and that her suffering subsequent to the injury was the natural and necessary result of such diseased condition, and that her injury, if any was received, was in no wise responsible for her pain and suffering or for the operation which was afterwards performed upon her. The issue was simple and well defined. While the rule is that a diseased person may recover damages for an injury which aggravates or accelerates a diseased condition, there must be some issue upon which that question may be tried. The issue here was that the plaintiff Mrs. Frick was "a strong, able-bodied woman in good health," and it was claimed all through the trial until these instructions were requested, that her affliction was caused solely by the accident. The object of making this issue, of course, was to magnify the damages. It does not seem just that the plaintiffs may

adopt one theory in a complaint which is required to state the facts, and try the case upon that theory until it comes to instructing the jury, and then require the court to instruct the jury upon some other theory. This is precisely the position the appellants are assuming in the case at this time. The issues which are made by the complaint and which are tried to the jury are issues upon which the court must frame his instructions, and if instructions are requested which state the law upon some other issues, the court is not bound to give them, for the court is required to confine the instructions to the scope of the allegations and proof. *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490. This Michigan case is criticised by the appellants, but we think it states a plain rule of common honesty, and is applicable here where the statute requires that the "complaint shall contain a plain and concise statement of the facts constituting the cause of action." Rem. & Bal. Code, § 258.

Appellants insist that the allegation in the complaint that Mrs. Frick was a strong and healthy woman prior to the accident is an immaterial allegation, because she is entitled to the same amount of damages whether she was a strong and healthy woman or diseased and predisposed to weakness and infirmity; citing 13 Cyc. 31. She was, no doubt, entitled to recover all the damages which she suffered, but damages accomplishing the same result to a person in perfect health would certainly be greater than to a diseased person. In this case the plaintiffs were standing upon the allegations of perfect health, and in all fairness should abide the result upon the issue as made by them. The instructions given were based upon the real issue made by both the pleadings and the proof. The jury found for the plaintiffs, necessarily finding either that Mrs. Frick was in perfect health before the accident or that she was diseased and did not know it. In the latter event, the jury made allowance for all damages on account of accelerated disease, as they were instructed they might do. We

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think the requested instructions were properly refused, and that the ones given stated the law as applied to the issues in this case, and in our opinion were all that the issues justified.

The judgment is therefore affirmed.

FULLERTON, MORRIS, ELLIS, and MAIN, JJ., concur.

[No. 10891. Department One. February 21, 1913.]

T. SHIGETA, *Appellant*, v. GAFFNEY INVESTMENT COMPANY
et al., *Respondents*.¹

LANDLORD AND TENANT—CONTRACT FOR BUILDING—CONSTRUCTION—REPAIRS. Where defendant agreed to construct a building and lease it to the plaintiff, who was to keep it in repair, and the building as constructed was leaky and defective and plaintiff only took possession under defendant's promise to remedy the defect and put it in proper shape, the plaintiff is not called upon to repair the building, and did not waive full performance by taking possession under defendant's promises.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 24, 1912, dismissing an action on contract, upon the opening statement of counsel for plaintiff. Reversed.

Shank & Smith, for appellant.

Farrell, Kane & Stratton, for respondents.

CHADWICK, J.—This is an appeal from a judgment of dismissal, entered upon the opening statement of counsel for plaintiff. The facts as we find them are taken from the pleadings, the attached exhibits and opening statement. The defendants entered into an agreement with the plaintiff to erect a building in the city of Seattle, in accordance with certain plans and specifications which had theretofore been agreed upon. The building was to be held under a lease with stipulated rent reserved for a period of seven years. The agree-

¹Reported in 130 Pac. 88.

ment and lease was made in one writing, and provided that plaintiff should take possession of the building upon its completion, and that he would thereafter "and during the continuance of this lease keep said building including the roof and all sewer connections in good and substantial repair and condition," and also "that if at any time repairs to said building may be necessary or required and the party of the second part [plaintiff] shall have neglected or refused to make the same, the parties of the first part [the defendants] may order such repairs made at the cost and expense of the party of the second part, and the party of the second part will upon demand pay to the said parties of the first part and to their order such cost or expense."

Plaintiff was notified on the 11th day of January, 1910, that the building was completed and ready for occupancy. The building at that time was apparently completed, but when it rained it was found to be in a leaky condition. Plaintiff then demurred, and we take it from the statement that he refused to take the building. Thereafter defendant served another notice calling upon him to take the property, and plaintiff again protested. Finally it was agreed that defendants would get the building in proper shape. Plaintiff relied upon this assurance and accordingly, on the 14th day of February, moved into the building. Plaintiff also alleges and offers to prove that when he discovered that the roof was still defective and would not turn water, defendants promised to fix it, and from time to time thereafter made such promises and on one or two occasions rebated rent on account of the damage occasioned by the rains. He also offered to prove that the building was at all times when it rained uninhabitable; that his tenancy was only continued because of the promises of defendants to remedy the defects. Relying upon such promises, he kept possession until December 8, 1910, when he was forced to abandon the building.

The trial judge did not discuss the motion for judgment, and from the arguments made here we assume that his ruling

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was based upon that clause of the lease which binds the plaintiff to keep the premises in repair. The court evidently believed that plaintiff had taken possession and had therefore waived his right to insist that the building be completed according to the plans and specifications before he moved in. Before defendants can invoke that clause of the contract for their protection, they must show a performance on their part. They must show that they have built and tendered a habitable structure for the use of the plaintiff; if they tendered a building which, because of defective construction, fails to meet the obligations that they had assumed, they cannot shift the burden of the loss by saying that plaintiff should not have relied upon their promise to perform, or their implied guaranty that the building was habitable at the time they notified plaintiff that it was ready for occupancy. Defendants' contract was to build; plaintiff's, to repair. The defect here alleged is one of original construction, not one arising from waste, damage or the ravages of time. This principle was recognized by this court in *Hardman Estate v. McNair*, 61 Wash. 74, 111 Pac. 1059, where we held that one leasing a room for a particular use was bound to put it in fit condition. The only difference between that case and this is that there the lessee refused to take possession when notified; while here, plaintiff was persuaded to take possession upon a promise to make the building habitable; that is, to perform the contract. It was not a new contract. It was simply a reaffirmation and assurance that the one which already existed would be performed.

Defendants seek to distinguish the *Hardman Estate* case by saying that there the lease expressly specified the use to which the premises were to be put, and that we held that this amounted to a warranty that the room would be fit for the uses intended. The case will bear no such distinction. When an owner agrees to erect a building to be rented for a graduated rental ranging from \$400 to \$600 per month, the law will imply a warranty to put a roof on it. The specifications are not

before us, but it is safe to assume that they provide for a roof that will shelter the building, and if so the cases are the same.

Several cases are cited by defendants, but they go to the defense of waiver. Whether plaintiff waived his right to insist upon a full performance of the contract is to be decided upon the evidence. It cannot be decided upon the pleadings and opening statement.

The judgment is reversed, with directions to the lower court to let the trial proceed.

CROW, C. J., PARKER, GOSE, and MOUNT, JJ., concur.

[No. 10651. Department One. February 21, 1913.]

M. LOUISE McDOWELL *et al.*, *Respondents*, v. H. C. BECKHAM
et al., *Appellants*.¹

JUDGMENT—DECREE IN PROBATE—CONCLUSIVENESS—COLLATERAL ATTACK. An erroneous decree in probate by a court having jurisdiction, admeasuring dower, not appealed from, fixes the widow's interest and is conclusive, and cannot later be collaterally attacked by grantees of the widow claiming that she owned a half interest in fee under the community property laws.

LIFE ESTATES—ADVERSE POSSESSION—HOSTILE POSITION—LIFE TENANT—RIGHTS OF REMAINDERMAN. Remaindermen are not bound to assert their title during the lifetime of the life tenant, and adverse possession under the ten-year statute of limitations, Rem. & Bal. Code, § 156, cannot be claimed, as against them, under a deed from the life tenant purporting to convey the fee.

LIFE ESTATES—ADVERSE POSSESSION—ACTS CONSTITUTING—CUTTING TIMBER. Cutting timber by a life tenant is not necessarily an act of possession, but is usually an act of waste.

LIFE ESTATES—ADVERSE POSSESSION—"TITLE." One claiming title under a deed of the fee from the life tenant cannot hold adversely to the remaindermen, under Rem. & Bal. Code, § 786, the seven-year statute of limitations for the recovery of lands held adversely under title in law or equity; "title" as there employed meaning a fee simple and not a limited fee.

¹Reported in 130 Pac. 350.

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LIFE ESTATES—ADVERSE POSSESSION—CLAIM AND COLOR OF TITLE—GOOD FAITH. The payment of taxes for seven years under color and claim of title in good faith, within Rem. & Bal. Code, § 789, cannot be asserted, as against remaindermen, under a deed from the life tenant purporting to convey the fee, as the claim cannot be asserted in good faith.

REMAINDERS—RIGHT OF ACTION—LIMITATION AND LACHES. Remaindermen are not guilty of laches in failing to assert title during the lifetime of the life tenant, even if the life tenant conveyed his interests by deed purporting to convey the fee.

REMAINDERS—WASTE—RIGHT OF ACTION. The statutory right of action for waste by remaindermen may be waived without creating or defeating a title to the estate.

LIFE ESTATES—ADVERSE POSSESSION—PAYMENT OF TAXES. It being the duty of a life tenant to pay taxes, he cannot assert title against remaindermen by the payment of taxes under the seven-year statute of limitations.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 30, 1912, upon findings in favor of the plaintiffs, in proceedings to distribute a condemnation award. Affirmed.

P. V. Davis (*S. S. Langland*, of counsel), for appellants.

Higgins & Hughes (*Hyman Zettler*, of counsel), for respondents.

CHADWICK, J.—One Marshall F. Moore died intestate on February 27, 1870, leaving a widow, Fanny Moore, and three children, M. Louise Moore, now McDowell, now aged 49 years; Thomas Ewing Moore, now 43 years old; and Frank Moore, now 46 years old. The decedent left an estate consisting of real property, situate in King and Thurston counties. The estate was administered in Thurston county, where the dower interest of the widow was admeasured. A life estate in the property in King county was set over and accepted by her. These proceedings were had on August 1, 1871. On April 29, 1870, Fannie Moore, the widow, duly made, executed, and delivered to one E. P. Van Trump her

general power of attorney, authorizing and empowering him to "enter into and take possession of all lands in which she then was or might thereafter be entitled to or interested in and to grant, bargain, sell the same, or any parcel thereof, for such sum or price, and on such terms, as to him should seem meet; and for her and in her name to make, execute, acknowledge, and deliver good and sufficient deeds of conveyance for the same," etc. This instrument was duly recorded on April 3, 1871, in the record of deeds of King county. On February 17, 1883, Fanny Moore, acting by and through her attorney in fact, Van Trump, conveyed the King county lands to Samuel C. Woodruff. This deed was executed for a valuable consideration, and purported to convey the full fee simple title to the lands in controversy.

The land passed from Woodruff, and through a chain of title, regular upon its face, to various grantees. The land was at one time platted as an addition to the city of Seattle, and afterwards vacated and then platted again, and is now embraced within the plat lines of Dwight's addition to the city of Seattle, of which the appellants Beckham are the owners of lots 78 and 79, which they have held under a paper title since June 5, 1889, since which time they have paid all taxes and assessments levied thereon. The land was originally covered by a growth of merchantable timber which has been logged off. The land, so far as the record shows, although we do not go beyond the lots in controversy, is still open and unoccupied.

Under a municipal improvement proceeding prosecuted by the city of Seattle, damages were awarded to respondents for the taking and damaging of the lots owned by appellants; whereupon the respondents, the heirs of Moore, claiming the remainder, petitioned the court for an order distributing the award between them and the grantee of their mother whose life tenancy is admitted. This the court did. The effect of this ruling being to limit the estate of appellants to the life of Fanny Moore, she being still alive, they have brought the

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case here, asserting their title under several theories which we will discuss in their proper order.

We are invited to a discussion of the statutes of 1869, 1871, and 1873, abolishing dower and creating our community property system, it being contended that, at the time of the death of Marshall F. Moore, the community property statutes were in effect and conclusive of the rights of the deceased and his relict; that, admitting that the legislature could not so legislate as to deprive an owner of his property, by taking one half thereof and giving it to his spouse, yet nevertheless, the right of dower being inchoate and resting in expectancy, that it was within the power of the legislature to abolish it and in lieu thereof substitute for the life estate a full estate in one-half of the property owned by the deceased spouse; that, upon the death of the owner, although the statute be inoperative in his lifetime, it would nevertheless operate as a statute of descent, and that Fannie Moore, having then one-half of the property in her own right and having conveyed the whole thereof, her children, being also the owners of one-half in their own right, would be foreclosed to assert title as against the plea of the general and special statutes of limitations, laches, and estoppel, all of which are asserted in aid of appellants' claims.

However this might be as between Fannie Moore and these appellants, the rule cannot be invoked against the respondents, who were put in the position of remaindermen subject to the life estate of Fannie Moore by a court of competent jurisdiction. We may admit that the decree admeasuring dower was entered upon a mistaken conception of the law, but it was duly entered and not appealed from, and it has fixed the relation of the respondents to the land in controversy. We so held in *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990. The holding in that case was elaborated in the later case of *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492, and needs no further discussion. This rule is well founded in reason

and is sustained by the authorities, the leading case being that of *Case of Broderick's Will*, 21 Wall. 503, where it was sought to show in a collateral proceeding that, notwithstanding an order of a probate court admitting the will to probate and fixing the status of those interested in the inheritance, the will was forged.

Passing this point, we will discuss the pleas in bar. The ten-year statute of limitations reads:

"The period prescribed in the preceding section for the commencement of actions shall be as follows:—Within ten years,—1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action." Rem. & Bal. Code, § 156.

Clearly under this statute the basis of a claim of title must rest in adverse possession. It assumes ownership and seizen, and as we have heretofore held, these are presumed to continue until an adverse possession of the property has continued for the ten-year period. See cases collected in note, Rem. & Bal. Code, § 156. Now, assuming that the respondents are remaindermen and that their estate is dominant to the present life estate of Fanny Moore, they were not bound to assert their title or take notice of the acts of her grantees or transmissions of the title to the subordinate estate during the life of the ancestor; for, under the well-known principles of the common law, their estate although vested is not to be enjoyed until the determination of the life estate (2 Blackstone Commentaries, 164; 4 Kent, Commentaries, 197) this, under the theory that possession in another is not hostile to, but consistent with, the dominant estate.

There has been no physical possession except the cutting of the timber, and this is not necessarily an act of possession, but is an act of waste. But granting possession, the only act from which an adverse possession might be implied is the

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transmission of title through the several recorded deeds. Here again we are met by the common-law rule that a remainderman is not bound to take notice of, nor is he bound by, deeds made subsequent in time to the creation of his interest. This rule is general and applies to all. An owner as against an outstanding subordinate estate may rest secure in reliance upon his record title; for, if it were otherwise, a lessee for a term, or any one in possession, might secure a deed from a stranger and thus initiate a paper title. That the object of our registry acts is for the benefit of subsequent holders and not for the protection of prior owners, has been held by this court. *McDonald & Co. v. Johns*, 62 Wash. 521, 114 Pac. 175, 38 L. R. A. (N. S.) 57. We find no place to apply the ten-year statute, unless the alleged waste was sufficient to start the running of the statute, a question we shall discuss presently.

The seven-year statute of limitations: It is next contended that, the appellants having been in actual, open, and notorious possession of the property for seven successive years, as evidenced by the platting and cutting of the timber and payment of taxes, Rem. & Bal. Code, § 786; or, if these features be eliminated and we hold that the land is vacant and unoccupied, that, having color of title as evidenced by the deed from the life tenant and having paid taxes for seven successive years, they should be held to be the owners according to the purport of their paper title. Rem. & Bal. Code, § 789. What we have said with reference to the ten-year statute answers, in the main, the arguments made under these sections of the code. These sections are not to be extended beyond their terms and necessary implications. They were drawn to protect rights, not to defeat them. Section 786 is not available, because appellants have no connected title in law or equity deducible of record, etc., as therein provided. The word "title" as there employed means a fee simple title, or one that equity will convert into a fee simple. Here the title was, and must remain during the life of the

ancestor, a limited fee beginning with the apportionment of her dower and ending with her life. Nor does § 789 aid appellants. While this court has held, in *Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462, and cases there cited, that a void deed is a sufficient color of title to start the statute, the right to hold land under these statutes does not depend on a deed alone but upon a claim of title asserted in good faith. *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166. There can be no such claim where the grantee takes a deed with knowledge, either actual or constructive, that his grantor is conveying that which is not his own. *Petticrew v. Greenshields*, 61 Wash. 614, 112 Pac. 749; *Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275. "A purchaser from the life tenant takes no greater interest than the interest of the life tenant." *Blair v. Johnson*, 215 Ill. 552, 74 N. E. 747.

In this case appellants either knew, or should have known, of the outstanding estate and that their title was subordinate to it. Persons may assert title to land, but the law fixes the time for the statute to begin to run against the remainderman, and unless that time has come, all pleas of the statutes of limitations must be unavailing; for the law is that a remainderman is, during the continuance of the precedent particular estate, under legal disability. *Jewett v. Jewett*, 10 Gray 31.

"The statute of limitations does not begin to run against the right of a remainderman to recover his remainder interest or establish his title to the same until after the determination of the preceding particular estate; nor is he guilty of laches in failing to assert his claim before his right to the possession of the property accrues. But this rule as to actions of a possessory nature does not apply to actions for injuries which the remainderman may maintain during the continuance of the preceding particular estate." 16 Cyc. 659, and cases there cited.

Hence, where a life tenant wrongfully conveys land in fee, limitations do not begin to run until the death of the life

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tenant. *Griffin v. Thomas*, 128 N. C. 310, 38 S. E. 903; *Rice v. Bamberg*, 59 S. C. 498, 38 S. E. 209; 1 Cyc. 1058.

It is further argued that the object of § 785 is to give a right of action "against the person claiming the title or some interest therein," and that having this right the appellants have been guilty of laches; aside from the fact that we will not, in the absence of some controlling equity, ignore the statutes of limitations and apply the doctrine of laches. *Petticrew v. Greenshields*, *supra*; *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. 1105; *Cordiner v. Finch Inv. Co.*, 54 Wash. 574, 103 Pac. 829; *Starr v. Long Jim*, 52 Wash. 138, 100 Pac. 194. We find that a remainderman "is not guilty of laches in failing to assert his claim before his right to the possession of the property accrues." 16 Cyc. 659; *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445; *Gibson v. Jayne*, 37 Miss. 164; *Graham v. Stafford*, 171 Mo. 692, 72 S. W. 507; *Pettyjohn's Ex'r v. Woodrooff's Ex'r*, 77 Va. 507; *Aiken v. Suttle*, 4 Lea (Tenn.), 103. As covering both the seven-year statute and the charge of laches, we quote from *Higgins v. Crosby*, 40 Ill. 260:

"There is no dispute that possession and payment of taxes, under claim and color of title for seven successive years, will bar a recovery in all cases where there is a present right of possession during the period for which the statute is required to run and its requirements are performed. The act of 1839 has been repeatedly held by this court to be a limitation law, and it can only be sustained upon that ground. And it is believed to be universally true that the bar of the statute can never be invoked, unless the party against whom it is sought to be used has had the opportunity of asserting his right during the statutory period. If the right is of such a character that a party is not entitled to make an entry, the statute can never run. It can only begin after the right to enter has accrued. Where the title sought to be defeated by the bar is a reversion or a remainder, the holders of such titles have no right of entry, and, having none, they are guilty of no *laches* in failing to make an entry, or in asserting the right. Such titles are not present and existing rights of

possession, but only a present interest, with a future right of possession. It would be unprecedented to hold that a right of entry was barred where such a right had never accrued. A party cannot be prejudiced by the non-assertion of a right that does not exist . . . When the particular estate is spent, the bar falls with that estate, and the right of entry then accrues to the remainderman or reversioner, and then, and not till then, the statute begins to run against him."

It follows from what we have said that respondents are not estopped by their failure to restrain or recover damages for the waste committed. Formerly a remainderman could not maintain an action for waste at all; he must have had possession either actual or constructive. The right first became a matter of equitable grace, and has since been generally recognized or declared by statute. Rem. & Bal. Code, § 938. *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76. The action for waste is personal in its character, and may be waived by the remainderman; at any rate, the act of waste would neither create nor defeat a title to the estate.

Neither can any right be predicated upon the payment of taxes. It is the duty of a life tenant to pay taxes. Consequently the remaindermen are not estopped thereby. 16 Cyc. 632; 12 Decennial Digest, Title, Life Estates, § 18. Finally, the acid test is put onto this case when we assert that, at no time since the rights of appellants and their grantors were initiated, could the respondents have stated a cause of action against them either to recover possession or to quiet title.

This being so, the judgment of the lower court is affirmed.

Crow, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

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Statement of Case.

[No. 10645. Department Two. February 21, 1913.]

JAMES R. ATKESON *et al.*, *Respondents*, v. JACKSON ESTATE,
Appellant.¹

CARRIERS — PASSENGER ELEVATORS — NEGLIGENT CONSTRUCTION — COMMON USE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in the construction of a well and cage for an automatic elevator in an apartment house, intended to be used principally by women and children without any attendant, notwithstanding it was such as was commonly used in like buildings, where it appears that the floors projected into the well without any gate, door or protection inside the cage, which could have been easily installed, and that a child fell when the elevator started, falling with its head projecting over the unprotected edge of the cage, where it was caught and crushed by the next floor projecting into the elevator well.

SAME—CONTRIBUTORY NEGLIGENCE OF PASSENGER OPERATING ELEVATOR—EVIDENCE—SUFFICIENCY. In such a case, the mother of a child two years old is not guilty of contributory negligence in attempting to use the elevator with her children, where she entered the elevator with another infant in a baby buggy, carrying a number of packages, her experience with elevators had been limited, and she testified that she did not realize the danger of such an accident.

SAME—PROXIMATE CAUSE OF ACCIDENT — EVIDENCE — SUFFICIENCY. In such a case, recovery is not precluded by the fact that she testified she did not know what caused the child to fall, since falls by children of tender years should have been anticipated, and the failure to guard against the same was the proximate cause.

DEATH — WRONGFUL DEATH — INFANTS — MEASURE OF DAMAGES—STATUTES—EVIDENCE. Under Rem. & Bal. Code, § 184, providing that parents may maintain an action for the death of a child, which is construed to limit the recovery to the value of the child's services to the age of majority, substantial damages may be recovered, without proof of special pecuniary loss, for the death of a baby girl, notwithstanding the parents are in comfortable circumstances financially, and capable of educating the child until the age of majority, which it had been their purpose to do.

Appeal from a judgment of the superior court for King county, Main, J., entered May 29, 1912, upon findings in

¹Reported in 130 Pac. 102.

favor of the plaintiff, in an action for wrongful death. Affirmed.¹

John W. Roberts (Ramey & Smith, of counsel), for appellant.

A. R. Rutherford and Milo A. Root, for respondents.

FULLERTON, J.—This action was brought by the respondents against the appellant to recover for the alleged negligent killing of their minor child. After issue joined, the action was tried by the court sitting without a jury, and resulted in findings and a judgment in favor of the respondents for the sum of \$1,000, and the costs of suit. This appeal is prosecuted from the judgment entered.

The record discloses that the appellant owns a five-story apartment house, situated in the city of Seattle. For the use of its patrons, the house is equipped with the usual stairways, and with an automatic electric elevator. The elevator was so constructed as to be used by the patrons of the house without the aid of an elevator operator. The elevator cage could be brought to any floor of the building by pushing an electric push-button on that floor. When the cage reached the floor, the door to the elevator shaft could then be opened, the passengers could enter the cage, and could direct the cage to the floor on which they intended to alight by pushing another push-button located inside the elevator cage numbered to correspond with such floor. The elevator cage and the shaft or well in which it operated were constructed in the usual way. The elevator cage was held in place by guide shoes, placed at the top and bottom of the cage on each side, which ran over guide strips extending from the bottom to the top of the well. The floors on each of the several stories on the side of the well containing the doors extended into the well some 2½ or 3 inches beyond the perpendicular wall, so that, as the floor of the cage came even with the floors of

¹Rehearing *En Banc* ordered.

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the building, it would be so far flush therewith as to leave an inconsiderable space between the two, while when between the floors there would be a space between the cage and the wall of the elevator well of from three to four inches. There was no means of closing the opening leading into the cage; so that, as the cage ascended and descended, the only obstacle preventing a passenger from falling out of the cage door was the wall of the elevator shaft.

On October 6, 1911, the respondents hired a suite of rooms on the fourth floor of the appellant's house. Their family consisted of a little girl two years and two months old, and a babe in arms. At the time of their entrance into the building, they were instructed as to the manner of operating the elevator by the persons in charge of the building, and informed that they could use it as one of the means of ingress and egress from their rooms to the street. Between the date named and November 7, 1911, a period of some thirty-two days, the mother used the elevator on an average of perhaps four times a week, passing up and down with her two children, carrying the younger one usually in a baby buggy. On the day last named, she left the building with her children for a trip down town to do some marketing, returning later with a number of packages, some of which she carried in her arms and some in the baby carriage. When she reached the elevator, she opened the elevator well door, entered the elevator cage as usual, placed the baby buggy at the far side of the cage, and instructed her daughter to hold onto it. She then closed the door and pushed the button for the floor on which her rooms were situated. As the elevator started, which was somewhat suddenly, the little girl fell forward with her head protruding through the cage door or opening. The mother reached for her at once, but before she could seize her the elevator had reached the second floor and had caught the girl's head between the floor of the cage and the protruding floor beam, crushing her skull and killing her.

The trial court found:

"That by reason of the manner in which the floors projected into the said elevator well, and by reason of the manner in which the edges were constructed, and by reason of the lack of a gate, door or other protection inside of said cage, and by reason of the fact that said elevator was without any operator, but was required to be operated by the passengers, and by reason of the fact that many of the tenants of the apartment house for whose use said elevator was maintained by defendant were women and children, the court finds that the defendant was guilty of negligence in maintaining said elevator for the uses and purposes and in the manner that it was then maintaining said elevator, and that the death of said Mildred Atkeson [the child killed in the elevator] was the direct and proximate result of said negligence."

The appellant contends that the record does not justify the conclusion that the matters herein enumerated convict it of actionable negligence. It contends, with reference to the projection of the floors of the building into the elevator well, and with reference to the want of a gate or door to the opening in the elevator cage, that the evidence shows that in these respects the elevator does not differ from those in common use generally; and that, if it be negligently constructed in this respect, then all elevators are negligently constructed, a conclusion that is not warranted from the mere fact that a child met its death on this elevator; and it argues with reference to the entire charge of negligence that all of the matters therein set forth were as obvious and apparent to the respondents as they were to the appellant or its officers; and that, since they made use of the elevator knowing and appreciating its dangers they cannot, because of the doctrine of contributory negligence, recoup for any injury they may have suffered thereby from the negligence of the appellant.

It must be conceded that, in so far as the evidence discloses, the elevator shaft or well and the elevator cage did not differ in manner of construction from those in common use. In the numerous elevator wells in the city of Seattle, and in

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those elsewhere of which the elevator constructors and builders had knowledge, the floors protruded into the elevator well at the landing places, as did the floors in this instance; and in only two instances was it shown that there was a gate or door to the entrance into the elevator cage. It was shown, also, that elevators operated by electric power did not differ materially in mechanical construction from those operated by power generated in the more ordinary ways; and that, in none of the electrically controlled elevators of which the witnesses had knowledge, was there a door or gate by which the entrance to the elevator cage could be closed. All the expert witnesses, however, who testified on the subject of elevator construction, stated that there was no mechanical reason why such a door could not be installed, and that it, if properly fitted, would protect passengers in the elevator from all such accidents as happened to the child in this instance.

But notwithstanding the fact that the elevator in question does not differ in construction materially from the elevators in common use, we think the trial court correctly decided that the manner in which this elevator was constructed and operated in this particular instance constituted negligence. It must be remembered that in this state the operator of an elevator is a common carrier of passengers, and is held to the degree of care imposed upon common carriers generally; they must exercise with reference to the elevators under their charge the "highest degree of care compatible with their practical operation." *Perrault v. Emporium Department Store Co.*, 71 Wash. 523, 128 Pac. 1049; *Edwards v. Burke*, 86 Wash. 107, 78 Pac. 610. And, consistent with this rule, it is not too much to say that the appellant should have had a door or gate by which the entrance to the elevator cage itself could have been closed.

It is not our intention to hold that all elevators now operated whose cages are without gates or doors are negligently constructed or operated. That question is not before us. What we mean to hold is that elevators, intended

for the use principally of women and children, which have no regular elevator operator and have no gate or door by which to close the entrance to the elevator cage, are negligently constructed and operated. It is no argument against this conclusion to say, as the appellant does say, that the users of the elevator might not close the door. Electric elevators, and doubtless other forms, also, could readily be so arranged as to be incapable of being operated until the door or gate should be closed; and, besides, to fail to close such a door would be negligence of the operator and not that of the owner. Without pursuing the argument further, therefore, we conclude that there was sufficient evidence of negligence on this branch of the case to justify the conclusion reached by the trial judge.

Was the mother of the child guilty of contributory negligence? On this question also we think the trial judge reached a correct conclusion. The mother testified that she did not realize that there was danger of an accident such as befell her child, and we can find no inherent improbability in her statement. Her experience with elevators was shown not to be wide, and it is perfectly natural that she would be obvious to dangers that are perfectly apparent to persons of a wider experience, and particularly to those who have to do with machinery and the accidents caused thereby. Elevators to which she had theretofore been accustomed all had regular elevator operators—persons who could and did protect against accidents such as befell her child; and we think it too much to charge her with a want of appreciation of the difference between such elevators and the one in question here, especially as the appellant's officers did not sufficiently appreciate such difference as to warn her thereof.

It is next argued that the cause of the accident is unknown and hence the respondents' case must fail under the authority of *Hansen v. Seattle Lum. Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Whitehouse v. Bryant Lum. & Shingle Mill Co.*, 50 Wash.

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563, 97 Pac. 751, and the kindred cases following the principle of those cases. This contention is based on the statement of the mother of the child to the effect that she did not know what caused the child to fall. But the liability or non-liability of the appellant does not depend on this fact. What caused the child to fall was an immaterial inquiry. The appellant was bound to anticipate that a child of her tender years was likely to fall while in the elevator from any one of a number of causes, and to guard against the danger arising from such fall whatever may have been its cause. The appellant's liability, in other words, rests on the fact that it made no provision to guard against the dangers arising from a person falling while in the elevator, not upon the particular cause of the fall. The cases cited do not oppose this principle. In neither of them was there any evidence showing or tending to show that the negligence charged against the defendant therein was the proximate cause of the injury to the plaintiff; while here, as we say, the proofs fix the proximate cause of the injury as the want of a proper guard to the opening into the elevator cage, and that for this the appellant was primarily responsible.

This action is founded upon § 184 of Rem. & Bal. Code, which reads as follows:

"A father or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward."

In *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714, we held that the measure of the damages recoverable under this section "is the value of the child's services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance. To which may be added in proper cases the expense of nursing and medical treatment, and in some jurisdictions even funeral expenses."

It was shown in the evidence, and, indeed, the court found, that the parents of this child were in comfortable circumstances financially, capable of giving the child an education, and that it was their purpose to educate her to the extent, at least, of that afforded by graduation from a state high school. Using the somewhat meager wording of the statute, our holding thereunder, and the testimony on behalf of the respondents as here outlined as a premise, the appellant makes the contention that there can be no recovery in favor of the respondents in excess of mere nominal damages. It is argued that, since a girl in this state reaches the age of majority at her eighteenth birthday, and since statistics show that the average age of girls who graduate from the high schools in the state of Washington is in excess of eighteen years, it is idle to say that a girl so graduating prior to that age has an earning capacity in excess of her cost of maintenance; that every father, who has reared a girl to that age and given her an education equivalent to that of graduation from the state high school, knows that the cost of her maintenance must of necessity exceed her earning capacity, and that any different claim is pure fiction.

But this reasoning does not seem to us to be controlling. It may be that, had the daughter reached her majority and had the respondents maintained their present financial condition and carried out their expectations concerning her, the expense of her care, nurture and education would have exceeded her earnings on their behalf. But since adversity and misfortune are sometimes the accompaniments of life, as well as prosperity and success, there is another side to the picture. It is possible that the respondents may lose the property they have accumulated, and at the same time their health and ability to earn money. If such a misfortune should befall them, might it not be said that the daughter's earnings, had she lived, would have greatly exceeded her cost of maintenance? And who shall say that such a misfortune may not

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befall them? And if the probability exists, why may not a recovery be based thereon? There is, of course, no certain measure of damages in cases of this character; but notwithstanding this difficulty, the great weight of authority is that a substantial recovery may be had. *Tecker v. Seattle, Renton & S. R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912 B. 842; *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Chicago & A. R. Co. v. Becker*, 84 Ill. 483; *Grotenkemper v. Harris*, 25 Ohio St. 510; *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85; *Ohio & M. R. Co. v. Wangelin*, 152 Ill. 138, 38 N. E. 760; *Bradley v. Sattler*, 156 Ill. 603, 41 N. E. 171; *Quill v. Southern Pac. Co.*, 140 Cal. 268, 73 Pac. 991; *Beaman v. Martha Washington Min. Co.*, 23 Utah 139, 63 Pac. 631; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Boyden v. Fitchburg R. Co.*, 70 Vt. 125, 39 Atl. 771; *Pierce v. Conners*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. 279; *Cleary v. City R. Co.*, 76 Cal. 240, 18 Pac. 269.

Some of the cases here cited are founded on statutes differing slightly from our own, and some lay down slightly differing rules for the measure of damages than is announced by the case cited from this court; but in principle they hold that it is the purpose and intent of the statutes to provide for the award to the parents of substantial damages in all cases where the death of their child is caused by the negligence of another. On another principle, also, there can be a substantial recovery in this case. Where the child killed is of tender years, proof of special pecuniary damages is not necessary to maintain the action or warrant a recovery for more than nominal damages. This we held in *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620:

“We are satisfied that the great weight of authority sustains the doctrine that judgment can be obtained in the absence of proof of special pecuniary damage. It is true that a great many of the cases which sustain this position are in states where exemplary damages are allowed in cases of this

kind; but the general doctrine is stated on the broad ground that proof of special damages is impracticable, and that no specific loss occasioned by the death of a child is necessary, for the reason that calculations of this kind are within the special province of the jury, and that the jury is as well calculated, knowing the age of the child, her health, her habits, her character, and the station in life of her parents, to judge of the pecuniary loss to the parents, as witnesses who might be called to testify."

To the same effect is *Ihl v. Forty-Second St. etc. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450, where the following language was used:

"The absence of proof of special pecuniary damage to the next of kin resulting from the death of the child would not have justified the court in non-suiting the plaintiff, or in directing the jury to find only nominal damages. It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances, it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that, without such proof, the plaintiff could not recover, would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject, beyond the age and sex of the child, the circumstances and condition in life of the parents, or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion."

The evidence tended to show that the child in the case at bar when she met her death was of sound health and vigorous body and as well developed mentally as the ordinary child of

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her age. We think, therefore, that the parents were entitled to recover substantial damages for her loss, and that the trial court did not err in its award.

The judgment is affirmed.

MOUNT and ELLIS, JJ., concur.

[No. 10859. Department One. February 24, 1913.]

ELIZABETH WORLEY, *Respondent*, v. METROPOLITAN MOTOR
CAR COMPANY, INCORPORATED, *Appellant*, HORTENSE P.
KING, *Defendant*.¹

SALES—CONDITIONAL SALES — RECORDING — INCUMBRANCES — ANTECEDENT DEBT—CHATTEL MORTGAGES—PRIORITY. A mortgagee in a chattel mortgage given to secure an antecedent debt, without notice of the conditional nature of the mortgagor's title, is an incumbrancer in good faith, who has priority over a prior unrecorded conditional bill of sale, within the meaning of Rem. & Bal. Code, § 3670, providing that conditional sales of property placed in the possession of the vendee shall be absolute as to subsequent purchasers, incumbrancers and subsequent creditors in good faith, unless the bill of sale be recorded within ten days.

SAME—RECORDING—WHEN TITLE PASSES—EXECUTION AFTER DELIVERY—VALIDITY. Under Rem. & Bal. Code, § 3670, providing that conditional sales of property placed in the possession of the vendee shall be absolute as to purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession, the bill of sale be recorded, the rights of the vendor can be reserved by a conditional bill of sale only when the contract is signed within ten days after possession was given over; and after delivery of possession, a conditional sales contract cannot be antedated and made to answer the purpose of a chattel mortgage.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered August 22, 1912, upon findings in favor of the plaintiff, in an action to foreclose a chattel mortgage. Affirmed.

Douglas, Lane & Douglas, for appellant.

Palmer & Askren, for respondent.

¹Reported in 130 Pac. 107.

CHADWICK, J.—Plaintiff loaned defendant \$800, on the 26th of April, the money to be used as part payment on an automobile to be purchased from the appellant, the Metropolitan Motor Car Company, and to be secured by a mortgage thereon. The car was received by the appellant on the 26th day of May, and was delivered to defendant King on or about June 1st. Some time thereafter—the manager of the appellant company says a few days, the defendant King says sometime after June 28—Mrs. King signed a conditional bill of sale contract. Plaintiff had ordered a chattel mortgage to be prepared. After some delay and one or two trips to the lawyer's office, Mrs. King found the lawyer in and executed the mortgage. The proofs show that the mortgage was prepared in anticipation of her coming, and although dated July 11, was in fact executed and filed for record on August 4. The conditional bill of sale was never filed for record. Appellant took possession of the car in December, and in January plaintiff began this action to foreclose her mortgage. From a decree of foreclosure and order of sale, the Metropolitan Motor Car Company has appealed.

The turning point in this case may be resolved as follows: Is a chattel mortgage, subsequent in time, entitled to priority over an unrecorded conditional sale?

The right to retain title in personal property sold and put in the possession of a vendee is, because of attendant abuses, generally covered by statute. Secret interests were not favored at common law and are not now. Consequently where the right is recognized it is usually provided that some record or publication of the fact be made, so that others who deal with the vendee will not be misled by apparent ownership. Our statute covering conditional sales seems to have been drawn with these principles in mind.

“All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall

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be absolute as to the purchasers, encumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides." Rem. & Bal. Code, § 3670.

It is the contention of the appellant that respondent is not a subsequent creditor in good faith; that the act was designed to protect only subsequent creditors, and then only when acting in good faith; citing *American Multigraph Sales Co. v. Jones*, 58 Wash. 619, 109 Pac. 108.

It also contends that respondent is not a creditor in good faith because she knew that the machine was not in the possession of the defendant at the time the loan was made, and might never be; and further, that the mortgage was taken to secure an antecedent debt without any new consideration, and therefore she is not entitled to the protection accorded *bona fide* purchasers and encumbrancers for value as against prior liens and equities.

Whatever the general rule may be as to priority between creditors, we think this case must be decided by reference to the statute and that alone. The provision that all conditional sales of personal property where the property is placed in the possession of the vendee shall be absolute is equivalent to the expression "shall be void," that is, of no legal force or effect as to purchasers, encumbrancers and subsequent creditors in good faith, unless the requirements of the statute are followed. Appellant seeks to overcome these provisions by reference to the case of *Wittler-Corbin Mach. Co. v. Martin*, 47 Wash. 123, 91 Pac. 629, and the general principles of equity as enunciated in *McDonald & Co. v. Johns*, 62 Wash. 521, 114 Pac. 175, 33 L. R. A. (N. S.) 57. In the first case, the only question was whether the conditional sale contract was sufficient in its terms to put a subsequent purchaser or encumbrancer on notice. The court held that it

was, and that a subsequent mortgagee and purchaser did not take in good faith. The other case held that, as between two mortgages, each given to secure a preexisting debt, the first in time was entitled to priority although recorded subsequently. Neither of these cases has any bearing here for the question is: Is respondent an encumbrancer in good faith within the meaning of the conditional sale statute?

One of the purposes of the statute was to avoid the rules which had theretofore protected latent equities and ownerships, otherwise it would not have provided that the sale should be absolute unless the contract be filed. A purchaser, encumbrancer, or subsequent creditor in good faith is, therefore, one who takes without notice; and if it appear that the contract was not recorded, he is entitled to rely upon the elementary principle of the law that possession indicates title. It is not shown that respondent had notice, either actual or constructive, of appellant's reserved title; consequently she is an encumbrancer in good faith. It was held in *Johnson v. Wood*, 19 Wash. 441, 53 Pac. 707, that a purchaser in consideration of a preexisting debt was a purchaser in good faith and entitled to protection over an unrecorded contract of sale with title reserved. It is true that the court found that the purchaser had waived a lien and this was enough to sustain her title, but the opinion goes further and finds no reason for the distinction which some courts draw between those who purchase in consideration of, or secure a preexisting debt and those who come after. A case in point is *Knowles Loom Works v. Vacher*, 57 N. J. L. 490, 31 Atl. 306, 33 L. R. A. 305, where a similar law was construed by the court, and the distinction between a purchaser "in good faith" and a purchaser "in good faith and for valuable consideration" is noted. The court said:

"This review of the cases shows that while it has been held that under our statutes requiring the subsequent mortgage to be not only in good faith, but also for a valuable consideration, a mortgage to secure an antecedent debt can-

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not supplant a prior unrecorded mortgage; and while it has been also held that an assignee under a voluntary assignment cannot set aside a previous mortgage because it is unrecorded, there is no authority for the contention that a subsequent chattel mortgage given for a preexisting debt is not superior to a prior unrecorded mortgage under our legislation, which prescribes that the only condition necessary to confer supremacy shall be that the subsequent encumbrance be taken in good faith. . . . The language of the act of 1889, 'subsequent purchasers and mortgagees in good faith,' is clear. It has no relation to the consideration of the mortgage except as to its honesty. A past consideration in that respect is as good as a present consideration. Such a mortgage is plainly one in 'good faith,' and that puts it within the protection of the statute. The object of the statute is to get rid of secret and latent equities. Public policy, as asserted in the extension of the registry laws, requires that the public record should show the ownership of personal property, and a construction which is favorable to that end should be given to the act. The failure to record tends to make transactions in personal property insecure, and, therefore, the mortgagee, who has created that condition against which the statute is aimed, has no just claim to outrank the creditor who, subsequently, secures his debt. The fact that the mortgage was taken for the benefit of the mortgagee and others does not impair its efficacy, nor assimilate it to the title, which is taken under a voluntary assignment for the benefit of creditors. The mortgagee acquired title for his own benefit, and gave as between him and the mortgagor a valuable consideration for it."

So far we have treated this case as appellant assumes it to be, but it may be seriously questioned whether appellant has in fact a conditional sale contract at all. It is not certain that the contract was signed within ten days after possession was given over to the vendee. If it was not, appellant can claim no rights under its contract. This is the logic of *American Multigraph Sales Co. v. Jones*, 58 Wash. 619, 109 Pac. 108. The contract of conditional sale must be made before or at the time of delivery, for it is in virtue of the statute that title is reserved. After delivery, title is *prima facie*

in the vendee, and a conditional sale contract cannot be thereafter antedated and made to answer the purposes of a chattel mortgage. *Houser & Haines Mfg. Co. v. Hargrove*, 129 Cal. 90, 61 Pac. 660; *Hyer v. Smith*, 48 W. Va. 550, 37 S. E. 632. The statute was passed for the protection of vendors, and not in aid of general creditors, although the creditor attempting to secure himself may have sold the thing covered by the contract. After title has passed by delivering the article, the remedy as against third parties is to secure the debt by chattel mortgage.

Judgment affirmed.

Crow, C. J., PARKER, Gose, and Mount, JJ., concur.

[No. 10823. Department One. February 24, 1913.]

THE COUNTY OF LEWIS, *Respondent*, v. D. W. MONTFORT,
Appellant.¹

COUNTIES—COUNTY BOARD — SALARIES OF OFFICERS — DETERMINING CLASSIFICATION OF COUNTY—CONCLUSIVENESS. The board of county commissioners acts in *quasi* judicial capacity in ascertaining by proof and determining the number of inhabitants in the county upon which the law fixes the salaries of county officers; and the order of the board, not questioned by appeal or writ of certiorari, is conclusive of the fact and of the proper classification of the county, and is a complete protection to a county officer in accepting the salary allowed him thereby.

COUNTIES—COUNTY OFFICERS—SALARIES—RECOVERY OF EXCESS SALARY. The acceptance by a county officer of a smaller salary, after the court has set aside the action of county commissioners in determining the classification of the county, does not affect his right to retain the larger salary paid to him under the order of the board of county commissioners.

Appeal from a judgment of the superior court for Lewis county, Rice J., entered January 24, 1912, in favor of the

¹Reported in 130 Pac. 115.

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plaintiff, upon overruling a demurrer to defendant's answer, in an action to recover money paid. Reversed.

Will H. Thompson, for appellant.

Forney & Ponder, for respondent.

Gose, J.—The plaintiff, the county of Lewis, brought this action to recover a portion of salary theretofore paid to the defendant as county clerk of that county. The complaint alleges that the defendant was elected county clerk of Lewis county at the general election held on the 3d day of November, 1908, for the term commencing on the 11th day of January, 1909; that, prior to the date of the election, the county had been legally ascertained to be a county of the thirteenth class; that, on the 17th day of February, 1909, the board of county commissioners of Lewis county, acting illegally, found that the county, on the 1st day of November, 1908, had, and then had, a population of more than 36,000 inhabitants, and caused an order to that effect to be entered upon its records, and "attempted" by such order to raise the classification of the county from the thirteenth to the seventh class, the order to take effect as of the 1st day of November, 1908; that on the 1st day of March, 1909, the board of commissioners entered an order directing the county auditor to draw warrants for salaries of the various county officers as provided by law for counties of the seventh class from and after January 1, 1909; and that, pursuant to such order, the county auditor issued salary warrants to the defendant as directed up to and including the 5th day of December, 1910. It is further alleged that the order mentioned was made without due deliberation, upon insufficient and unreliable data, without due or proper investigation, inadvisedly, and through mistake, and that the county, at the time the order was entered and at no time thereafter, had a population of 35,000 inhabitants. The complaint further alleges that, on the 19th day of December, 1910, in an action then pending in the superior court of Lewis county, wherein one Frase was

plaintiff and the county auditor of Lewis county was the defendant, a decree was entered whereby it was adjudged that the county did not have a population greater than 32,127, on the 1st day of November, 1908, or at any subsequent time, as shown by the Federal census of 1910, and restrained the county auditor from issuing salary warrants in excess of the amount provided by law for counties of the tenth class; and that, since the entry of such judgment, the defendant has accepted warrants for his salary at \$125 per month. The salary of the county clerk in counties of the thirteenth and tenth classes is \$1,500 per annum, and for counties of the seventh class it is \$1,800 per annum. A demurrer to the complaint was overruled. The defendant electing to stand upon his demurrer, a judgment was entered against him for the salary paid him in excess of that provided for in counties of the thirteenth class.

Stripped of its elaboration, the complaint means that the order entered by the board of county commissioners determining the number of inhabitants in the county on the first day of November, 1908, was made upon insufficient evidence. This court has held that the board of county commissioners has jurisdiction to determine the population of a county for the purpose of fixing its classification, and that it may ascertain that fact by proof, just as it may determine any other fact arising in the discharge of its duties. *State ex rel. Smith v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135. In the course of the opinion, it is said:

“In the absence of any law pointing out how that population should be ascertained, the board of county commissioners can determine the fact by proof, just as it can determine any other fact necessary for the discharge of its duties.”

In *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797, in commenting on the same question, we said:

“It was thus determined that, for the purpose of ascertaining the class to which a county properly belonged and

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fixing salaries, the county commissioners and superior court were authorized to determine the population as it existed when the county officers were elected, and that they should be compensated accordingly."

In *State ex rel. Sheehan v. Headlee*, 17 Wash. 637, 50 Pac. 493, it was held that a board of county commissioners in passing upon a claim against the county acts as a *quasi* judicial body, and that the allowance of a claim is an adjudication which is conclusive. The same general principle has been applied to the acts of a county board of equalization. *Edison Elec. Ill. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132; *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912 B. 870. In *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475, the claim of the coroner for services, which upon the face of the claim was a legal charge against the county, was allowed by the board of supervisors, and a warrant drawn upon its order was paid. In a suit by the county to recover the money so paid, it was alleged that the services were not performed; that the coroner made the claim knowing it to be false, and that by such false statements he wilfully misled the board of supervisors, and that they allowed the claim, relying upon the false statements which it contained and believing that the services had been performed by him as therein stated. A demurrer to the complaint was sustained, and the ruling was affirmed upon appeal. The court said:

"In other words, after the claim of defendant has been duly passed upon and allowed by the board of supervisors, acting in a judicial capacity, it is now sought in this collateral proceeding to prove that the finding of the board on a question of fact was not correct. The very question which the board had the right to determine, and which it was its peculiar and exclusive province to determine, was as to whether or not the services set forth in the claim had been performed. It was the duty of the board, in its judicial capacity, to carefully examine this question. It had the right to the advice and assistance of the district attorney of the county, and the

right to bring witnesses before it and examine them on questions of fact. From the decision of the board of supervisors on questions of fact, in regard to matters of which it has jurisdiction, there is no appeal. If the board exceeds its jurisdiction, or allows claims which are illegal upon their face, or in direct violation of law, there is a remedy. There, no doubt, may be cases in which a court of equity in a direct proceeding would entertain a suit to set aside the allowance of a claim where such allowance has been procured by fraud, but this is not such case. In this case it is sought by plaintiff to recover by proving that the services for which the money was paid were never performed. Defendant procured the money by proving before the proper tribunal that the services had been performed. Plaintiff now seeks, without attacking the judgment of the tribunal which allowed the claim, to recover back the money by proving that the services were never in fact performed. We are aware that in several of the states such doctrine has been sanctioned, but the rule has been long settled the other way in this state, and we see no reason to change it."

In *Mitchell v. County of Clay*, 69 Neb. 779, 96 N. W. 673, 98 N. W. 662, the object of the action was to recover money received by a former county officer in excess of the compensation allowed him by law. Upon an exhaustive review of its own decisions, it was held that the board of commissioners acts *quasi* judicially in passing upon claims against the county, where it is called upon to pass upon facts or exercise discretion in fixing the amount to be allowed; but where the course to be pursued or the amount to be allowed is fixed by law, it has no discretion, the acts are ministerial and it must follow the law. The pith of the decision is contained in the following language:

"Hence it would seem clear that a settlement with a county officer, which, in substance, is an adjustment of his accounts, does not become *quasi* judicial, so as not to be reviewable otherwise than by appeal, because claims were filed for sums claimed to be due such officer, and allowed for the purpose of enabling warrants to be drawn therefor. If, in such case, the compensation to be allowed the officer is fixed by law, the

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allowance of the claim is formal only. On the other hand, if the amount to be allowed is in the discretion of the board, or if, in fixing such amount, the law requires the commissioners to decide questions of fact, their action is *quasi* judicial."

See, to the same effect: *Crouch v. Pyle*, 70 Neb. 60, 96 N. W. 1049; *Santa Cruz County v. McPherson*, 133 Cal. 282, 65 Pac. 574; *Board of Com'rs of Laporte County v. Wolff*, 166 Ind. 325, 76 N. E. 247.

There are two well defined exceptions to the rule that the judgment of a board of county commissioners is conclusive upon questions within its jurisdiction. The first is based upon the statute, and the second is where the board acts ministerially and the law leaves it no discretion.

The statute, Rem. & Bal. Code, § 3909, provides for appeal and certiorari from the order of the board of county commissioners. It expressly provides that such remedy shall not prevent a party from enforcing his claim in the courts by a direct action, after it has been presented and disallowed in whole or in part by the board of commissioners. Hence, in *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137, where a claim for salary was presented to the board of county commissioners and disallowed, a direct action brought by the claimant in the superior court against the county was sustained.

In recognition of the second exception, in *Tacoma v. Lillis*, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372, cited by the respondent, it was held that a city may recover money paid to a member of the city council in excess of the salary allowed by law. So in *Chehalis County v. Hutcheson*, 21 Wash. 82, 57 Pac. 341, 75 Am. St. 818, a judgment enjoining the payment of salary warrants was affirmed on the ground that the warrants were issued under the provisions of a statute which was in conflict with the constitution. The court said that the board of commissioners had no authority to make the contract upon which the warrants were later issued, but recognized the distinction between those cases where there was no power

or authority vested by law in the board and cases where there was power which was irregularly or erroneously exercised. A like view was taken in *James v. Seattle*, 22 Wash. 654, 62 Pac. 84, 79 Am. St. 957. In *Ada County v. Gess*, 4 Idaho 611, 43 Pac. 71, a case upon which the respondent places some stress, the court held that payments made by the board of commissioners to a public officer "which are positively and absolutely forbidden by the statutes of the state and by the constitution thereof, may be recovered back." *Weeks v. Texarkana*, 50 Ark. 81, 6 S. W. 504, and *Village of Ft. Edwards v. Fish*, 156 N. Y. 363, 50 N. E. 973, voice a like principle. In *Krieschel v. Board of Com'rs*, 12 Wash. 428, 41 Pac. 186, an order restraining the removal of the county seat was affirmed, where it conclusively appeared that the number of legal votes cast upon the proposition to remove the county seat was not ascertained by the board of county commissioners, and that the board had not canvassed the election returns.

In the case at bar, the board of commissioners acted upon a subject-matter within its jurisdiction. The question which it determined was one of fact only, i. e., the population of the county. When that fact was determined, the law fixed the classification. The character of the evidence and the question of its weight and sufficiency were confided by law to the judgment of the board. The power to decide carries with it necessarily the power to decide wrong. After the board had determined the population of the county, the appellant received and collected salary warrants conformably to the order. The board, in finding the fact and entering the order, acted in a *quasi* judicial capacity, and the order is a full protection to the appellant in this suit. As was said in the *Alameda County* case: "If the board exceeds its jurisdiction or allows claims which are illegal upon their face, or in direct violation of law, there is a remedy." And as said in the *Clay County* case, where, in determining the amount to be allowed, "the law requires the commissioners to decide ques-

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tions of fact, their action is *quasi* judicial." The distinction is this: Where the law fixes the salary of a county officer, no discretion is left to the board of county commissioners, and any order that it may make in an attempt to allow a salary in excess of that provided by law affords no justification to the officer for receiving the excess salary. But when the law gives the board the power to determine a fact, it acts in a *quasi* judicial capacity, in reaching a conclusion and its order affords protection to those who act upon it.

The acceptance of the smaller salary after an adjudication in a case to which the appellant was not a party does not militate against his right to retain the salary voluntarily paid him. *Butler v. Supreme Court of Foresters*, 53 Wash. 118, 101 Pac. 481, 26 L. R. A. (N. S.) 293.

The judgment is reversed, with directions to sustain the demurrer.

CHADWICK, PARKER, MOUNT, and MAIN, JJ., concur.

[No. 10935. Department One. February 24, 1913.]

MABELLE KEELER, *Appellant*, v. R. B. PARKS *et al.*,
Respondents.¹

ACTIONS—PREMATURE ACTIONS—COMMUNITY PROPERTY—DIVORCE. An action by a wife to recover an interest in community real estate not disposed of by a decree of divorce, rendered in California at the suit of the husband, is premature, where the decree was "interlocutory," reciting that the husband has established grounds for the dissolution of the marriage bonds, and that upon the expiration of one year, final judgment granting a decree of divorce be entered, which time had not elapsed when the wife's action was commenced.

PLEADING—SUPPLEMENTAL COMPLAINT—OFFICE. In an action to quiet the title of a divorced wife in community property not disposed of by the decree, which was prematurely commenced before the final decree of divorce was entered, it is not allowable by supplemental complaint to plead the subsequent entry of the decree of di-

¹Reported in 130 Pac. 111.

vorce; since a premature action cannot be sustained by a supplemental complaint showing a later cause of action under a new class of facts which is the antithesis of the first cause pleaded.

PLEADING—SUPPLEMENTAL COMPLAINT—DEPARTURE. An action commenced by one as a divorced woman, to recover a joint interest in community property not disposed of by a decree of divorce, cannot be sustained by the substitution, in a supplemental complaint, of a cause of action by the wife for the protection of her rights in the community property of herself and husband, a final decree of divorce not having been entered; since it would be the substitute of a different cause of action.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 23, 1912, on the pleadings, dismissing an action to quiet title. Affirmed.

Hamlin & Meier, for appellant.

William Hickman Moore and *Morris & Shipley*, for respondents.

Gose, J.—The appellant, who was the plaintiff below, brought this action in her maiden name, to set aside a deed conveying certain real property to the defendant corporation. A judgment dismissing the action without prejudice was entered upon the pleadings, on the ground that the action had been prematurely commenced, and that, at the time of its commencement, no cause of action existed in her favor.

The action was commenced in November, 1911. It is alleged in the original complaint that the appellant and the respondent R. B. Parks were husband and wife, at all times mentioned in the complaint until the 22d day of April, 1911; that in 1906 the respondent, her then husband acting for the community, entered into a contract for the purchase of the land in controversy; that the payments were made from community funds conformably to the requirements of the contract, so that the community became entitled to a conveyance of the property on the 12th day of February, 1911; that the respondent husband, intending to cheat and defraud the ap-

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pellant out of her community interest in the property, without her knowledge, caused it to be conveyed by the holder of the legal title to the respondent corporation, he then being its treasurer; that thereafter, and on or about the 21st day of April, 1911, in an action in the superior court of the state of California, in the county of San Francisco, the appellant "was duly granted a decree of divorce from the said defendant R. B. Parks," which decree restored her maiden name by which she sues, and that no disposition was made of the community property. The prayer is that the property be adjudged the "joint property" of the appellant and her former husband, and that the respondent corporation be directed to convey to her "an undivided one-half interest" in the property, and that her title thereto be quieted.

In June, 1912, the appellant filed a supplemental complaint, wherein she alleged that, in the divorce action in the state of California wherein her husband was the plaintiff and she was the defendant, it was adjudged, on or about the 27th day of April, 1911, that the husband had established grounds for the dissolution of the marriage bonds, and that "an interlocutory decree" was entered directing a final judgment of divorce, and that thereafter, and on or about the 3d day of May, 1912, a final judgment was duly entered in accordance with the provisions of the interlocutory decree. She prayed relief as in the original complaint.

The respondents, in separate answers, after denying certain averments of the complaint, set forth portions of both the interlocutory and final decrees in the divorce action *in haec verba*. The former recites that the respondent husband, the plaintiff therein, "is entitled to an interlocutory decree" adjudging that he has established grounds for the dissolution of the marriage bonds, subject to the provisions of the statute, "and that upon the expiration of one year from the entry of this decree, final judgment granting said decree and restoring said parties to the status of single persons be en-

tered herein." The final decree, which was entered on the 2d day of May, 1912, recites:

"Wherefore, it is hereby ordered, adjudged and decreed and this court does hereby order, adjudge and decree that the marriage between said plaintiff and said defendant be and the same is hereby dissolved and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all obligations thereof and restored to the status of single persons; and it is further ordered that said defendant is permitted to resume her maiden name to wit, Mabelle A. Keeler."

The affirmative answers set forth the provisions of the statutes of the state of California, defining the effect of an interlocutory decree in divorce actions and directing the time when the final decree may be entered. It is then alleged that the statutes pleaded have been construed by the court of last resort in the state of California to mean that the marriage relation is not dissolved by the entry of the interlocutory decree, but that it is only dissolved when the final decree has been entered; that at the time this action was commenced, in November, 1911, the marriage relation had not been dissolved; that no cause of action had accrued in favor of the appellant, and that her action "was prematurely commenced." The appellant replied, admitting that at the time of the commencement of the action the bonds of matrimony existing between herself and her husband had not been dissolved.

The motion for a judgment dismissing the action upon the pleadings was properly sustained. The pleadings show that the action was premature. A state of facts that had not ripened into a cause of action when the suit was commenced cannot be supplemented by a class of facts that came into being later so as to make a cause of action. In other words, it is not allowable in a supplemental complaint to set up a class of facts which are at complete variance with and antagonistic to the facts which existed when the action was commenced. The original complaint is based upon a state of facts which did not then exist. The office of a supplemental

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pleading is to show facts "which occurred after the former pleadings were filed." Rem. & Bal. Code, § 308.

"To entitle the plaintiff to file a supplemental bill, and thereby to obtain the benefit of the former proceedings, it must be in respect to the same title, in the same person, as stated in the original bill. Thus, if a person should file an original bill, as heir-at-law of the mortgagor, to redeem; and it should turn out, upon an issue and hearing of the cause, that he is not the heir-at-law, and he afterwards purchases the title of the true heir-at-law, he cannot file a supplemental bill to have the benefit of the former proceedings; for he claims by a different title from that asserted in the original bill. His true course would be to file an original bill." Story, Equity Pleadings (10th ed.), § 339.

In *Gunby v. Ingram*, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232, an action was commenced to foreclose a mortgage for an alleged default in the payment of interest, which by the terms of the note matured the whole debt. Thereafter a supplemental complaint was filed, in which it was alleged that the principal debt had matured and was unpaid. After holding that there had been a valid tender of the interest, the court said:

"Of course, if the first action was premature, which we are constrained to hold, it is manifest that it could not be the basis for the supplemental complaint which was filed in the case."

See, to the same effect: *Otto v. Griffin*, 54 Wash. 506, 103 Pac. 789; *Commercial Bank of Tacoma v. Hart*, 10 Wash. 808, 38 Pac. 1114; *Augir v. Foresman*, 23 Wash. 595, 63 Pac. 201; *Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Andrews v. Andrews*, 3 Wash. Ter. 286, 14 Pac. 68; *Maynard v. Green*, 30 Fed. 643.

In *Augir v. Foresman* a writ of attachment was sued out upon a note which had not then matured, conformably to the provisions of the statute permitting the issuance of the writ

when the requisite facts exist and nothing but time is wanting to fix an absolute indebtedness. Thereafter the writ was dissolved, and it was held that the action abated, although the note had matured before the order was made. In *Lawrence v. Pederson* the court, in speaking of the office of a supplemental pleading, said:

“The office of a supplemental complaint is merely to enlarge or change the kind of relief to which a party may be entitled upon a cause of action existing at the time of the commencement of the suit.”

In *Andrews v. Andrews*, the wife sought to vacate a judgment entered against her husband by confession, on the ground that the indebtedness upon which the judgment was confessed was fictitious, and to set aside a sale of real estate upon an execution issued upon the judgment, alleging that the real estate was community property. After the cause was at issue, she asked leave to file a supplemental complaint showing her divorce from her husband, a judgment against him and her purchase of his interest in the community real estate at an execution sale under her judgment, alleging that her judgment became a lien prior to the time the judgment lien of the other defendant attached. This was refused, and her action was dismissed. In affirming the judgment, it was held that the proposed supplemental complaint “would have effected a revolution in the issues to be determined, and would have amounted to a substitution of a new cause of action.”

The appellant argues, that the contract for the purchase of the land vested the equitable title in the community; that under the statute, a married woman may maintain an action against her husband or any other person for the protection of her property rights, both separate and community, where the requisite facts exist; and that, upon the entry of a decree of divorce when no disposition is made of the community property, the former members of the community hold title to the community property as tenants in common. The vice of the argument lies in the fact that the appellant did not commence

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her action as a married woman; nor did she seek to have the property restored to the community. She alleged that she was a divorced woman, and prayed that a decree be entered directing a conveyance of an undivided one-half interest in the property to her. In her supplemental complaint she pleads that the final judgment was entered after the commencement of her action, and in her reply admits that she was not divorced when her action was commenced. It is one of the fundamentals of the law that one cannot plead one cause of action and recover upon another which is the antithesis of the cause first pleaded. If she had a cause of action in the beginning, which we need not decide, she failed to plead it, but seeks to recover upon a different one which later came into being. Other issues tendered were not passed upon by the trial court, and will not be considered on this appeal.

The judgment is affirmed.

CROW, C. J., PARKER, CHADWICK, and MOUNT, JJ., concur.

[No. 10526. Department Two. February 24, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. E. DAVIS,
Appellant.¹

ASSAULT—AGGRAVATED ASSAULT—EVIDENCE—SUFFICIENCY. A conviction for second degree assault upon conflicting evidence is sustained, where there was testimony to the effect that the accused made a sudden assault with a shoe knife to avenge a grievance of his younger brother, while the prosecuting witness was unarmed and at a disadvantage.

SAME—ELEMENTS OF OFFENSE—GRIEVOUS BODILY HARM—QUESTION FOR JURY. Under the statute making the inflicting of grievous bodily harm upon another an essential element of assault in the second degree, the question is one of fact for the jury and not of law for the court, and it is error for the court to determine the same in its instructions.

¹Reported in 130 Pac. 95.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—PRESUMPTIONS AS TO NATURAL AND PROBABLE CONSEQUENCES. The presumption that the accused intended the natural and probable consequences of his acts does not extend beyond the actual consequences; and where the wounded person recovered from an attack that was likely to produce death, it is error to instruct the jury that they could presume that the attack was made with intent to kill, if death was the usual and ordinary result of the defendant's voluntary acts.

ASSAULT—AGGRAVATED ASSAULT — EVIDENCE — MATERIALITY. In a prosecution for aggravated assault, inflicted to avenge a grievance of the accused's brother, to which the accused was not a witness and had only second-hand information, it is proper to exclude evidence of the altercation with prosecuting witness constituting the brother's grievance, as the same is immaterial.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered December 4, 1911, upon a trial and conviction of second degree assault. Reversed.

Samsel & Engeset, for appellant.

FULLERTON, J.—The appellant was informed against for the crime of assault in the first degree, the information reading as follows:

"Comes now Ralph C. Bell, as the duly elected, qualified and acting prosecuting attorney for the county of Snohomish, state of Washington, and by this his information, charges and accuses the above named defendant, E. Davis, with the crime of assault in the first degree.

"In that on or about the 26th day of August, 1910, in the county of Snohomish, state of Washington, the said defendant, E. Davis, did unlawfully, and with intent to kill one Elmer Moss, assault said Elmer Moss with a deadly weapon, to wit: a knife then and there held in the hands of him, the said defendant, E. Davis, and did then and there wilfully inflict grievous bodily harm upon the said Elmer Moss with and by means of said deadly weapon aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington."

To the information, the appellant pleaded not guilty, and was put upon his trial before a jury, which returned a verdict finding him guilty of assault in the second degree. From

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the judgment and sentence pronounced against him upon the verdict, he appeals.

Of the errors assigned, the first to be noticed is the assignment to the effect that the evidence is insufficient to justify the verdict returned by the jury. In support of this assignment, the appellant quotes largely from the testimony of himself and the testimony introduced on his behalf; and it may be that, if this testimony stood alone, there would be merit in the contention. But the evidence was conflicting. That on the part of the state tended to show that the assault was wanton and cruel. It appeared that the prosecuting witness had just passed his sixteenth birthday, while the appellant was some two years his senior; that there was no previous acquaintance between the appellant and the prosecuting witness, nor any quarrel between them preceding the assault; that the assault was made to avenge some real or fancied grievance a younger brother had against the prosecuting witness, and not any quarrel of the appellant's own; that it was made with a shoe knife, although the prosecuting witness was without weapons of offense or defense of any kind; and was made upon the prosecuting witness while he was in a reclining position upon the ground, suddenly, and before he could assume, or attempt to assume a defensive attitude. There was, therefore, clearly a sufficient dispute in the evidence to require the submission of the cause to the jury.

The court, among other instructions, gave the following to the jury:

"You are further instructed that assault in the second degree, for the purposes of this case, is defined by the law as follows: 'Every person who, under circumstances not amounting to assault in the first degree, shall wilfully inflict grievous bodily harm upon another with a weapon, shall be guilty of assault in the second degree.'

"Therefore, if you shall believe the evidence beyond a reasonable doubt, as that doubt is defined to you in these instructions that the defendant, Elbert Davis, in the county of Snohomish, state of Washington, on or about the date al-

leged, wilfully inflicted grievous bodily harm upon Elmer Moss with a weapon and are not satisfied beyond a reasonable doubt that he intended to kill him, then you must find the defendant guilty of assault in the second degree.

"In this connection you are instructed that the harm and injury suffered by Elmer Moss, as testified in this case, was grievous bodily harm within the meaning of the law."

The appellant complains of the last clause of the instruction, contending that the question whether or not the wounds inflicted by the appellant upon the person assaulted amounted to grievous bodily harm within the meaning of the law was a question of fact for the jury, and not one of law for the court. Logically this contention seems to be sound. Since the subdivision of the statute under which the information is drawn makes the infliction of grievous bodily harm upon another an essential element of assault in the second degree, it is, of course, necessary to charge in the information that the injury inflicted was grievous bodily harm, and since the plea of not guilty puts in issue all of the material allegations of the information, it must follow that the question whether the particular injury inflicted amounts to grievous bodily harm is a question of fact for the jury to determine, rather than a question of law for the presiding judge. The court should therefore have defined the term grievous bodily harm to the jury, and left it to them to say whether the particular wounds inflicted upon the prosecuting witness came within the definition of the term.

To the same effect are the authorities. In *Murphey v. State*, 43 Neb. 34, 61 N. W. 491, the defendant was convicted of the crime of assault with intent to inflict on the person of another great bodily injury, and appealed from the judgment of conviction. Discussing the grounds for reversal suggested by counsel in the course of the argument on the appeal, the court used this language:

"The term 'great bodily injury,' as employed in the statute, is perhaps not susceptible of a precise legal definition. It is, however, an injury of a graver and more serious character

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than an ordinary battery; and whether a particular injury is within the meaning of the statute, is generally a question of fact for the jury and not of the law. (See *State v. Gillett*, 56 Ia. 459.) That a great bodily injury, within the meaning of the statute, may be inflicted without the use of a 'dangerous' or even 'offensive' weapon is quite apparent from the facts of this case, to which reference will hereafter be made."

In *State v. Gillett*, 56 Iowa 459, 9 N. W. 362, complaint was made of the instruction of the court to the jury, concerning which the court said:

"The prosecuting witness, Zeaman Magoon, at the time of the injury complained of lived with the defendant, and at the time of the trial was about eight years old. He testified that the defendant whipped him with a crupper to harness, with a buckle on the end of it. He was examined some time afterward, and injuries, covered with scabs, some of which were suppurating, were found on his back and side. The court gave the jury an instruction as follows: 'A great bodily injury is an injury to the person of a more grave and serious character than an ordinary battery, and the indictment charges that defendant intended to inflict such an injury on the boy Magoon. It is not only necessary for the state to prove that the defendant committed an assault, but it must go farther and prove the intent with which he committed it, and that it was to inflict a grave and more serious injury than an ordinary battery or whipping. If the proof should show an assault and battery, but fail to show the ulterior intent charged, the conviction could only be for assault and battery.' The giving of this instruction is assigned as error. It must be conceded that the instruction does not furnish the jury the means of determining what is the extent of an injury which will constitute a great bodily injury, for the limits of an assault and battery with which it is compared and which it is declared to exceed, are not defined. And yet it must be admitted that the instruction defines a great bodily injury as accurately and completely as it is susceptible of definition, as a matter of law. Whether an injury is a great or only a slight bodily injury is essentially a question of fact, and it is difficult to see how any greater aid can be furnished the jury in determining that question than was done by the court in this case."

For other authorities touching the general question, although perhaps not so directly in point, see: *Smith v. State*, 58 Neb. 531, 78 N. W. 1059; *Rogers v. State*, 60 Ark. 76, 29 S. W. 984, 46 Am. St. 164, 31 L. R. A. 465; *People v. Miller*, 91 Mich. 639, 52 N. W. 65; *George v. State*, 21 Tex. App. 315, 17 S. W. 351; Bishop, Statutory Crimes, § 318; Roscoe, Criminal Evidence (8th ed.), p. 772.

The court gave the following instruction to the jury:

"You are further instructed that every man is presumed to intend the usual, ordinary and natural results of his voluntary acts, even though there be no direct or positive proof of such intention.

"Therefore if you shall believe from the evidence beyond a reasonable doubt that the defendant, Elbert Davis, in the county of Snohomish, state of Washington, at or about the time alleged, inflicted the harm upon the said Elmer Moss which has been testified to, then you have a right to presume that the defendant intended to do so; and if you shall believe from the evidence beyond a reasonable doubt that the usual, ordinary and natural result of the defendant's voluntary acts would likely result in death, then you have a right, if consistent with all the testimony in this case, to infer that he intended to cause death."

This instruction is also erroneous. While it is true that a man is presumed to intend the natural and probable consequences of his acts, it is true also that the presumption arising from the acts alone never extends beyond the actual consequences of the acts. If one person wilfully assaults another and inflicts upon him a dangerous wound, the jury would have the right to infer from the act that he intended to inflict the dangerous wound; or, if one person wilfully assaults another and inflicts upon him a dangerous wound likely to cause death and death ensues therefrom, the jury have the right to infer from the act and its consequence that he intended to kill the person assaulted; but if a man assaults another and inflicts upon him a dangerous wound likely to cause death but death does not ensue, the jury have no right to infer from the

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act alone that he intended to kill, because such was not the consequence of the act. *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; *State v. Williams*, 36 Wash. 143, 78 Pac. 780. So in the instruction in question, it was error to instruct that the jury might infer from the mere assault and the infliction of the wound that the defendant intended to kill the prosecuting witness, because death was not the consequence of the act. Intent in such cases is gathered from all the circumstances of the case, of which the assault and wounding are only a part.

While the appellant's brother, Trueman Davis, was on the witness stand, he was asked concerning an altercation he had had with the prosecuting witness some little time before the encounter between the prosecuting witness and the appellant. Objections were interposed and sustained to this line of examination, we think properly, on the ground that it was immaterial. It was not shown nor offered to be shown that the assault made by the appellant was made in defense of his brother, and consequently the altercation between the brother and the prosecuting witness would afford no justification for the appellant's acts. It is said, however, that such acts were admissible as tending to show the appellant's condition of mind, and as affecting the question of his intent and purpose in making the assault. But, again, it was not shown that he was a witness to the altercation; on the contrary, the evidence showed the fact to be otherwise, and that his knowledge of it could be but second hand. What he was informed concerning it, and not the actual occurrence, was therefore the material inquiry. To show what the brother told the appellant concerning the difficulty between himself and the prosecuting witness might have been material, but not so the actual occurrence, unless it was further shown that the appellant witnessed the actual occurrence.

Complaint is also made that the court did not submit the appellant's theory of the encounter to the jury, but no fault can be justly found with the instructions in this respect.

The judgment is reversed and the cause remanded for a new trial.

MOUNT, MAIN, ELLIS and MORRIS, JJ., concur.

[No. 10449. Department Two. February 24, 1913.]

EDMOND GENNAUX, *Respondent*, v. NORTHWESTERN
IMPROVEMENT COMPANY *et al.*, *Appellants*.¹

MASTER AND SERVANT—INJURY TO SERVANT—FALL OF OVERHEAD ROCK IN COAL MINE—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. The negligence of the master in failing to provide a safe working place in a coal mine is for the jury, where it appears that a miner was injured by the fall of a great quantity of overhead rock, all of which could not have come from his own roof, but it could have come from, and there was evidence of a fall of rock in, an adjacent chute, which was admitted to be in bad condition.

SAME—SAFE PLACE TO WORK—COAL MINE—DUTY OF INSPECTION. Where coal miners were expected to work up to the line of a chute, which they were not to enter or inspect, it is the continuing duty of the master to inspect and keep such adjacent space in a safe condition.

SAME—FELLOW SERVANTS—COAL MINES—EMPLOYEES IN ADJACENT WORKINGS. No question of the negligence of fellow servants is involved, where an employee was injured through failure to inspect and keep a working place safe.

SAME—SAFE PLACE—COAL MINE—ASSUMPTION OF RISKS—UNKNOWN DANGERS. A coal miner does not assume the risks of dangers in adjacent works not under his control or subject to his inspection, and of which he had no knowledge, and which were not due to changing conditions, but to a "squeeze" known to the fire boss and the foreman, neither of whom gave any notice or warning thereof.

SAME—CONTRIBUTORY NEGLIGENCE. Evidence that the roof over a miner's room fell, does not establish his contributory negligence in placing props, as a matter of law, where the cause of the fall was a question for the jury.

SAME—JOINT TORT FEASORS—MASTER AND MINE FOREMAN. A foreman, having direct supervision of a mine, who knew of dangerous

¹Reported in 130 Pac. 495.

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conditions and took no step to remedy them, is guilty of negligence as a joint tortfeasor with the company, and both may be joined in one action.

SAME—MASTER AND GENERAL SUPERINTENDENT—DUTY AND NOTICE. A general superintendent of a mine having no duty of personal inspection of the underground workings and no actual knowledge of a dangerous condition, known only to the fire boss and mine foreman who did not report it, is not liable with the company as a joint tortfeasor.

DAMAGES—PERSONAL INJURIES—TOTAL DISABILITY—EXCESSIVE VERDICT. A verdict for \$18,000 for personal injuries sustained by a strong, well, coal miner, 29 years of age, capable of earning \$4 per day, is not excessive, where he was rendered a cripple for life, with practically no earning power, his left leg was atrophied and partly paralyzed, he had little control of his urinary organs and suffers constant pain, with no hope of recovery.

Appeal from a judgment of the superior court for King county, Gay, J., entered February 25, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a coal miner. Affirmed in part, and reversed in part.

C. H. Winders, for appellants.

Vanderveer & Cummings, for respondent.

ELLIS, J.—This is an appeal from a judgment entered upon a verdict against the appellants jointly, in favor of respondent, for \$18,000 damages, for personal injuries sustained by the respondent while employed by the appellant Northwestern Improvement Company as a miner in one of its coal mines at Ravensdale, Washington. The appellants Lawrence and Edwards were respectively mine foreman and general mine superintendent.

The careful and dispassionate manner in which the case was tried by counsel on both sides renders an inherently complicated situation comparatively easy of statement. In the mine in question, the coal lies in a vein about six feet thick, tilted in an upward pitch of about thirty degrees. The mine is entered by a slope sunk on the vein, from which, at the

various levels, counters and gangways are run at right angles. From these counters and gangways, chutes about ten feet wide are drifted upward, dividing the vein at intervals of thirty to fifty feet. These chutes are connected at intervals of about fifty feet by passages for ventilation, called cross-cuts. The miners worked in pairs, each pair digging a chute and the adjacent half of the cross-cuts to the chutes on either side. The coal in the vein is thus blocked into irregular segments called pillars, extending from the gangway upward to the end of the vein or working. These pillars contain about seventy-five per cent of the coal in the vein, and the work so far is largely preliminary to the mining of the coal so blocked. Sheet-iron troughs or chutes are laid in the chute to expedite the running of the coal down the incline to the gangway, where it is taken from the mine in cars.

In mining the pillars, the work progresses from the upper end of the chutes toward the gangway. Beginning on the right hand side of the chute which they have driven, the miners take successive slices off the upper corner of the last pillar but one, so that the coal in the pillar above will have better access to the chute. When the top pillar has been mined, the miners drop down to the third pillar from the top, again take off the upper corner to facilitate the mining of the second pillar, repeating this process till the gangway is reached, when that section of the vein is completed.

As the work progresses, both in chutes and pillars, props are set as may be necessary to sustain the roof, the company furnishing the timbers and the miners setting them. By the system pursued in this mine, each pair of miners was held responsible for the safety of the immediate place of work to the extent of looking to the condition of their own roof, timbering, and supporting it. These miners, however, had nothing to do with the adjacent workings, the evidence clearly showing that they were not even allowed to enter and inspect them without special direction from the management, except possibly in removing from the pillar the last slice of

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coal next the adjacent chute. This coal, however, was always removed from the other side.

All of the work was done under the supervision of the mine foreman. There was also a fire boss, whose duty it was to go through the mine every morning before work commenced and inspect for gas, bad roof, and other dangers to the men. It was his duty to post on a bulletin board at the entrance to the mine, so that the miners might see it as they entered, notice of any dangers found on such inspection. He also testified that, in entering the mine, the men would pass him and he customarily warned them personally of any dangers found from caving or bad roofs. The following is a reduced reproduction of a plat in evidence, showing the relative location of chutes, cross-cuts, and pillars in that portion of the mine where the accident occurred.

AR



Chute 27 was driven by the respondent and his partner, as were also the cross-cuts on either side, one-half the distance to the next chute. The adjacent chutes and other half of the cross-cuts were driven by other pairs of miners working independently of respondent and his partner. The men in chute 26 had mined the coal from the eighth or upper-

most pillar to the right of that chute, and were then working a short distance below. The respondent and his working mate had sliced off diagonally a large part of the seventh pillar at the right of chute 27, and had mined nearly all of the eighth pillar, leaving a stump of coal on the margin of chute 26 and above cross-cut eight, about four or five feet thick at the lower end, gradually widening to ten or twelve feet in thickness at the upper end. Immediately above cross-cut eight, they had removed the coal from this stump through to chute 26, to a distance of about four feet above the cross-cut. The shaded portion of the plat indicates the unmined coal in the seventh and eighth pillars.

At the time of the accident, the respondent's partner was setting a drill post at a point on the left side of the stump of coal, about ten feet up from the lower end, at the place indicated by a single dot. The respondent was between two posts or props at the foot of the stump, as indicated by the other two dots. He was facing the coal in a bent posture, clearing the floor to place sheet-iron upon which to run the coal to chute 27. He testified that, while so engaged, he heard a sound as of something falling to his right and apparently in chute 26 above the cross-cut, and immediately thereafter was knocked senseless. His partner testified that he heard a sound as of something falling in chute 26 on the opposite side of the stump of coal from where he was working, causing a jar so violent as to shake the body of coal and cause pieces to fall therefrom on his side; that he at once went to the respondent, and found him almost covered by rocks and debris with a large rock on his legs, which he rolled off; that one of the props was down and there was a hole in the roof immediately above respondent, about a foot or eighteen inches deep, and three, four, or possibly five feet square, from which some of the roof had fallen; that while he was extricating the respondent, some rocks rolled down from above in chute 26 and onto respondent's place of work. After the accident there were about two carloads, or over

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four tons, of rocks and debris lying in chute 26 opposite the eighth cross-cut and extending over into the cross-cut and onto respondent's place of work. There was no evidence of a fall of roof in chute 26 over this pile. The undisputed evidence shows that all of this rock could not have come from the respondent's own roof, as the hole there was not large enough to have furnished it. The prop which was down had stood within less than three feet of the line of chute 26, and it is respondent's contention that it was knocked down by stones rolling from a fall of roof a short distance up 26 down the incline, and deflected by posts or other rocks into the respondent's workings. The mine was in absolute darkness but for the oil lamps worn upon the miners' caps, which the evidence shows, throw a light but for a distance of six or seven feet.

The negligence charged in the complaint is that rocks fell from the roof of chute 26 above cross-cut eight as a result of the careless and negligent condition in which it was left, and rolled with the pitch across the respondent's workings, injuring him; that the place was under the supervision and control of the appellants Lawrence and Edwards, who knew of the danger but failed to warn the respondent of it. The answer denied the allegation of negligence, and set up, as affirmative defenses, assumption of risk, contributory negligence, and negligence of fellow servants. At appropriate stages of the trial, motions were made for nonsuit as to each of the defendants, for judgment notwithstanding the verdict as to each defendant, and for a new trial as to each. The overruling of these motions are assigned as errors.

It is first contended that there was no proof of negligence. It is, of course, conceded that the respondent was injured by a fall of rock; but the appellants contend that there was no evidence that it came from chute 26. Stress is laid upon the respondent's testimony that it all happened in the "clap of a hand," and that of his partner that it happened in the "flash of an eye." They did assent to questions so worded on

cross-examination, but this was manifest hyperbole. The men were foreigners, expressing themselves with some difficulty, and from their whole testimony it is plain they merely meant that the catastrophe covered but a short interval of time. The respondent testified that he heard the noise in chute 26 and thought the rock came from there. This, together with the undisputed fact that upon and near the respondent's place of work immediately after the accident were some four tons of rocks which no one testified were there before, and his partner's testimony that there was a sound and jar of a fall in chute 26 sufficient to shake the stump of coal from 6 to 10 feet thick, was certainly persuasive evidence that rocks coming from a fall in 26 rolled upon the respondent's place of work, knocked out the prop, and caused whatever fall there was from his own roof. The evidence is conclusive that rocks had before been falling in the upper end of 26, that a "squeeze" or settling of the roof there had already set in, and that the fire boss and Lawrence, the mine foreman, knew of this condition. Their knowledge was notice to the company.

It is urged that where the rocks causing the injury came from was a matter of mere conjecture. It was no more conjectural than any other fact depending upon circumstantial evidence. They could have come but from one of two places, either from chute 26 or from respondent's own roof; and the positive evidence as to the sound of a fall in 26 immediately prior to the accident, and of large masses of rock upon and near respondent's place which could only have come from 26, and that other rocks rolled down from 26 onto respondent's place of work while his partner was removing him, was evidence which, considering the admitted bad condition of chute 26 above cross-cut eight, was sufficient to take the case to the jury upon this question.

It was admitted that respondent and his partner were expected to work right up to the line of chute 26, which chute they were not supposed to enter or inspect. It was therefore

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the appellant's duty to inspect, and keep that adjacent space in such condition as not to cause injury to these men. *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244. This duty was not at an end when the miners in 26 had finished there. The duty continued so long as an unsafe condition in 26 would be an unnecessary menace to men in adjacent workings. The duty to inspect and keep safe or to warn these men of the danger that they might take steps to protect themselves was a continuing duty of the master. No warning of any kind was given. The question of fellow servant is not involved. *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169; *McKenzie v. North Coast Colliery Co.*, *supra*; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *McMillan v. North Star Min. Co.*, 32 Wash. 579, 73 Pac. 685, 98 Am. St. 908; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398.

The fire boss had inspected the mine on the morning in question, knew of the dangerous condition of chute 26, but neither warned these men, who were working right up to its margin, nor posted any notice of danger upon the bulletin board. Lawrence, the pit boss or mine foreman, had gone through the mine, knew of the dangerous condition of chute 26, knew that a squeeze had there set in, but neither warned these men nor took any step to remedy the conditions. The evidence was uncontradicted that it was his duty to supervise the workings and to see that the methods employed by the men were safe. The respondent testified that no one ever warned him of this danger, and there is no evidence that any one ever did warn him or that he knew of it. He did not assume the risk of dangers in his place of work resulting from the condition of adjacent workings, not under his control nor subject to his inspection. This case falls directly within the rule announced in *McKenzie v. North Coast Colliery Co.*, *supra*. Appellants cite many cases holding that where, in the operation of the work, conditions are constantly

changing and the employee knows it, he accepts such risks as are ordinarily incident to such operations. *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202. That rule has no application here. The changed conditions in chute 26 were not due to work then in progress. It was due to a squeeze of which the appellant had knowledge, but of which the respondent had neither knowledge nor warning.

The respondent was not guilty of contributory negligence unless the injury was caused by the insecure placing of the prop to his own roof which fell, and of this there was no evidence except that it fell. What caused it to fall was, as we have seen, under the evidence a question for the jury. Contributory negligence as a matter of law was not established.

The evidence which we have discussed makes it plain that the appellant Lawrence was guilty of personal negligence. He had the direct supervision of this mine. He knew of the dangerous conditions, took no steps to remedy them, and failed to warn the respondent of their existence. His negligence was that of the company. He and the company were liable as joint tortfeasors, and may be joined as defendants in the same action. *Shearman & Redfield, Negligence* (5th ed.), § 122; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; *McHugh v. Northern Pac. R. Co.*, 32 Wash. 30, 72 Pac. 450; *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70, 74 Pac. 1064.

As to the appellant Edwards, the evidence presents a different aspect. He was general superintendent, not alone of this mine but of all of the company's mines in that locality. While he had a general supervision, there was no evidence showing a duty of personal inspection of the underground workings on his part. There was no evidence that he had actual knowledge of the condition of chute 26, or that either the fire boss or mine foreman had reported these conditions to him. As to him the action should have been dismissed.

Several assignments of error were based upon the court's

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instructions. We have read these instructions with care and find that, as a whole, they correctly presented the law as applied to the evidence. We find no prejudicial error in the instructions.

Finally, it is contended that the verdict was excessive. At the time of the injury, the respondent was a strong, well man, twenty-nine years old. He is now by reason of the accident a cripple for life. He was capable of earning as a coal miner an average of \$4 a day. He can now earn practically nothing. His left leg is atrophied and almost completely paralyzed. He has little control of his urinary organs and suffers constant pain. There is little hope of relief from any of these conditions so long as he lives. While the verdict seems large, we cannot say, in view of the respondent's helpless and hopeless condition, that it is unreasonable. *McKenzie v. North Coast Colliery Co.*, *supra*; *Murphy v. Pacific Tel. & Tel. Co.*, 68 Wash. 643, 124 Pac. 114.

The judgment is affirmed as to the appellants Northwestern Improvement Company and William Lawrence. It is reversed with directions to dismiss as to the appellant Edwards, who is entitled to his costs.

MOUNT, MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10772. Department Two. February 24, 1913.]

C. W. YOUNG, *Respondent*, v. ALONZO C. JONES *et al.*,
Appellants, P. W. TONNESON *et al.*, *Respondents*.¹

REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY. Equity will reform a deed where the evidence of a mutual mistake is clear and convincing, and the evidence is sufficient that a warranty deed, excepting a mortgage which the "first" party assumed to pay, was so written by mutual mistake, where every witness present when the deal was consummated contradicted the evidence of the grantee that he did not assume it, and corroborated the preliminary written agreement of the parties (FULLERTON, J., dissenting).

¹Reported in 130 Pac. 90.

EQUITY—LACHES—REFORMATION OF INSTRUMENTS—DELAY. A delay of three years in bringing action will not defeat the right to reform a deed which by mutual mistake provided that the grantor, instead of the grantee, assumed payment of a mortgage, where no rights of third parties were involved, the parties had early notice of plaintiff's claim, and no one was placed in a worse position by reason of the delay, and there was no evidence of fraud or bad faith.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 12, 1912, upon findings in favor of the plaintiff, in an action for reformation. Modified.

John B. Keener and Ralph Simon, for appellants.

ELLIS, J.—This appeal presents the question of the right to reform a deed on the ground of mutual mistake.

The plaintiff Young brought an action against the defendants to foreclose a mortgage upon certain real estate, situated on Vashon Island, in King county, executed on September 10, 1904, by the defendants Jones and wife to the defendant Tonneson, for \$900, and by Tonneson assigned to the plaintiff, and demanding personal judgment against Jones and wife. In 1908, Jones owned this property, and the defendant Lofgren owned certain real estate in Tacoma upon which there was a mortgage for \$1,000. In February, 1908, Jones and Lofgren agreed to an exchange of these properties. The memorandum of the agreement was as follows:

“Agreement by and between A. C. Jones and Louis Lofgren as follows to exchange properties now listed with E. F. Gregory on following basis: Warrantee deeds to each except present mortgages, also abstracts, said Jones to pay in addition \$500 in cash when papers are ready for transfer. Commission to be \$200 to E. F. Gregory Co., to be paid by Louis Lofgren.

2-17-08.

Louis Lofgren,
A. C. Jones.

“Rec'd fifty dollars on above Feb'y 17-08. Louis Lofgren.”

On February 24, 1908, deeds passed between the parties in consummation of the agreement of exchange; the deed

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from Lofgren and wife to Jones providing for the assumption of the \$1,000 mortgage on the Tacoma property by Jones; the deed from Jones and wife to Lofgren warranting against all encumbrances, "except a certain mortgage for \$900 given to P. W. Tonneson, which party of the first part assumes and agrees to pay." Jones paid the \$500 cash to Lofgren, and Lofgren the \$200 commission.

In the foreclosure suit, which was commenced in February, 1911, Jones and wife filed a cross-complaint, alleging that, in making the last-mentioned deed, the words "party of the *first* part" were used by mutual mistake, and should read "party of the *second* part," to conform to the intention of the parties that Lofgren assume the mortgage; and asked that the deed be so reformed, and in the event of any judgment being rendered upon the note and mortgage, that it be rendered against Lofgren and wife upon the assumption clause so reformed. The Lofgrens answered this cross-complaint, denying that they assumed or agreed to assume the mortgage, and resisting any reformation of the deed. After hearing the evidence, the court made appropriate findings for the foreclosure of the mortgage and for personal judgment thereon against Jones and wife, and further found that the defendants Jones were not entitled to have the deed executed by them to Lofgren reformed or modified in any respect. A decree was entered, foreclosing the mortgage, rendering a personal judgment against Jones and wife for the amount of the mortgage debt with interest, costs, and an attorney's fee, directing a sale of the property to satisfy the judgment, and also adjudging that, in case the property be sold to satisfy the judgment, then the defendants Lofgren have judgment against the defendants Jones "for the principal sum of said note and mortgage sued upon herein, to wit: \$900, together with interest thereon accrued since September 10, 1907." The defendants Jones have appealed.

The evidence shows that the exchange was negotiated through one Kessinger, who was in the employ of the real

estate firm of Gregory & Company. Both Jones and Kessinger testified in substance, that they went to Lofgren's place of work and it was finally agreed that Jones and Lofgren would exchange properties, each to assume the mortgage on the property he received and Jones to pay Lofgren a difference of \$500; that, on Kessinger's suggestion, the memorandum was written by Kessinger and Jones and signed by Jones and Lofgren; that Jones gave Lofgren a check for the \$50 earnest money, and Lofgren signed the receipt therefor at the foot of the memorandum. Lofgren admitted signing the memorandum and receipt, but stated that he thought it was only a memorandum providing for his payment of the commission. He denied the agreement as stated by Kessinger and Jones, and testified in substance that he then stated he did not want property with a mortgage upon it, and that the real agreement was that Jones was to take the Lofgren property and pay the mortgage of \$1,000 on it, and Lofgren was to take the Jones property, and Jones was also to pay the mortgage of \$900 on it, and a difference of \$500 cash, the Lofgren property being estimated at a value of \$5,000, and the Jones property at \$3,500. The deeds were prepared and executed in the office of Gregory & Company, one S. R. Webb of that firm acting as notary. He testified as follows:

"They were to exchange properties and each was to assume the mortgage on the property he received and Jones was to pay Lofgren a cash difference of \$500. My recollection is that Lofgren's property was put in at \$5,000 and Jones' at \$4,500. Lofgren was to pay our firm a commission of \$200. I gave these terms of the agreement and the description of both properties to our stenographer to draw the deeds. Both Lofgren and Jones fully understood that each was to assume the then existing mortgage on the property he was to receive. I took the acknowledgments of Lofgren and his wife and Jones and his wife to the respective deeds. I recognize this . . . as the deed given by Jones and wife to Lofgren. Lofgren was to assume the mortgage on the Vashon property deed by Jones and wife to him. This deed is

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a mistake in that Lofgren does not assume to pay the mortgage on the Vashon Island property."

Jones testified that he looked over the deed but did not discover the mistake. Eric Lofgren, a brother of Louis, testified to the effect that he and Louis, on February 2, 1908, went to Vashon Island to see the Jones place, and he then heard Louis tell Jones that Jones would have to pay both mortgages; that he, Louis, could not under any other conditions trade with Jones, as he wanted a place free from encumbrances. He also estimated the Lofgren property at a value of \$5,000, and the Jones property at \$3,500. One Heu de Bourck, who it seems initiated the deal by introducing Kessinger to Jones, testified that, as he understood the deal, Jones was to accept the Lofgren property and assume payment of the \$1,000 mortgage thereon, and give in exchange the Jones property free of all encumbrances, and pay to Lofgren \$500 additional in cash; that he considered the Jones property worth \$2,500, but Jones had a short time before refused to take \$3,500 for it. It does not appear that either Eric Lofgren or Heu de Bourck was present when the final terms were agreed upon or when the deeds were passed. It is fairly inferable that they only testified as to matters developed in preliminary negotiations.

Jones further testified, that in May, 1908, he received a notice from a Tacoma bank that the interest on the \$900 mortgage would soon be due; that he notified the bank that Lofgren had assumed the mortgage; that some days later he received a letter from E. R. York, attorney for the holder of the mortgage, stating that there was some dispute as to who should pay the interest; that he at once called on York and was informed that, in the deed which he had given to Lofgren, he, Jones, had assumed and agreed to pay the mortgage; that he then protested that it was a mistake and that he would never pay it; that he then had his attorney, J. B. Keener, prepare a corrected deed, which was tendered to Lofgren who refused to accept it; that, believing that Lofgren

would pay the mortgage, he took no further steps in the matter till February, 1911, when the foreclosure action was commenced.

We think that the evidence which we have thus fully reviewed strongly preponderates in favor of the appellants. The testimony of every witness who was present when the terms of exchange were finally agreed upon and also when the deeds were passed, save that of Lofgren himself, sustains the memorandum as speaking the intention of the parties. The evidence is clear and convincing that it was the intention of both parties that Lofgren should assume the payment of the \$900 mortgage, and that the recital in the deed to the contrary was a mutual mistake. In such a case a court of equity will, in the absence of countervailing equities, grant a reformation. 4 Pomeroy, Equity Jurisprudence (3d ed.), § 1376; *Elliott v. Sackett*, 108 U. S. 132; *Coggins & Owens v. Carey*, 106 Md. 204, 66 Atl. 673, 124 Am. St. 468, 10 L. R. A. (N. S.) 1191; *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210.

The decision of the trial court seems to have been determined largely by the fact that the appellants waited almost three years after discovering the mistake before taking any action to reform the deed. The doctrine of laches as a defense is grounded on the principle of equitable estoppel, which will not permit the late assertion of a right where other persons by reason of the delay will be injured by its assertion. The case before us presents no such aspect. No right of a third party is involved. The respondents Lofgren had notice of the appellants' claim almost as soon as the mistake was discovered. There is no evidence that the respondents or any one else will be placed in any worse position by a reformation because of the delay. No adverse equities have arisen in the interim. The fact of appellants' claim was at all times known to those claiming adversely. There was no evidence of fraud, deceit, or bad faith on the appellants' part. In such a case, mere delay, short of the period fixed by the statute of limita-

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tions, will not bar the action. The question is dependent upon the inherent equities of the particular case. 20 Cyc. 725, 726; *Eno v. Sanders*, 39 Wash. 238, 81 Pac. 696; *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210; *Gay v. Havermale*, 27 Wash. 390, 67 Pac. 804; *Brun v. Mann*, 151 Fed. 145, 12 L. R. A. (N. S.) 154; *White v. Bailey*, 65 W. Va. 573, 64 S. E. 1019, 23 L. R. A. (N. S.) 232; *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775; *Neppach v. Jones*, 20 Ore. 491, 26 Pac. 569, 849, 23 Am. St. 145. The appellants are entitled to the reformation sought. They are not barred by laches to assert their right.

The decree as relating to the issue between the appellants and the respondents Lofgren is reversed. The cause is remanded with direction to so modify the decree as to grant the reformation of the deed in question, and to provide that, in case a sale of the property to satisfy the mortgage debt leaves a deficiency, the appellants have judgment over for such deficiency against the respondents Lofgren.

CROW, C. J., MAIN, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting)—In my opinion the evidence in favor of a mistake in the deed is not so clear and convincing as to warrant a reformation. I therefore dissent from the conclusion reached by the majority.

[No. 10776. Department One. February 24, 1913.]

AUGUST PETERSON, *Appellant*, v. GRANT SMITH *et al.*,
Respondents.¹

APPEAL—REVIEW—PRESUMPTIONS. It will be presumed that a trial on the merits was on the issues made by the pleadings.

ACCORD AND SATISFACTION—EVIDENCE. Where defendants agreed that, if plaintiff took over a certain contract and sustained a loss, they would in any event pay him \$150 a month, the acceptance of a sum of money in payment of the salary "in full for all work on north trunk sewer to date," implies that there was a loss, and constitutes a complete accord and satisfaction; since plaintiff was not entitled to recover both on the contract and his salary in case of loss.

Appeal from a judgment of the superior court for King county, Main, J., entered May 4, 1912, upon findings in favor of the defendants, in an action on contract, after a trial on the merits to the court. Affirmed.

James Kiefer, for appellant.

Fred W. Dricken and *Randolph E. Hilbert*, for respondents.

CHADWICK, J.—Suit upon contract. Defense, an accord and satisfaction. From a judgment in favor of defendants, plaintiff has appealed, relying upon the principle laid down in *Seattle, Renton & Southern R. Co. v. Seattle-Tacoma Power Co.*, 63 Wash. 639, 116 Pac. 289. It is there held that, where there are several items of account, the payment of a liquidated and agreed item does not satisfy an unliquidated item or debt, upon the theory that there is nothing left to operate as a consideration for the accord and satisfaction. To sustain his contention, plaintiff, in his brief as well as in the bill of exceptions, undertakes to make it clear that plaintiff had three separate contracts with the defendants;

¹Reported in 130 Pac. 338.

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that only one of them is or could be affected by the accord and satisfaction. Notwithstanding the witnesses have been made to speak of three contracts in the bill of exceptions, we think the case when viewed in the light of the pleadings will not bear that construction.

Plaintiff sets out a contract to do certain work, and as a part of the same cause of action says: "In addition thereto, the plaintiff performed the following work not embraced in his aforesaid contract." He then sets out four items of work and service which, he says, were made necessary in the proper execution of his contract. These items were denied and were properly treated as issuable under the pleadings, the obvious question being whether they were a part of the main contract. We must presume that the court tried the case upon the issues made by the pleadings, and so presuming, we find that there was an accord and satisfaction of all differences existing between the parties.

The amount alleged to have been paid in accord and satisfaction of all claims existing between the parties was the sum of \$550.80. The payment is evidenced by receipt saying that it is "in full for all work on north trunk sewer to date." Although the bill of exceptions is not complete upon this point, there is enough in the pleadings and briefs to warrant us in saying that this sum was given in payment of a monthly salary, and was provided as a part of the original contract between the plaintiff and the defendants. The defendants alleged that it was agreed that, if plaintiff took over a certain contract and made a loss thereon, they would in any event pay him \$150 per month. Looking at the case in this light, the money paid would not be, as plaintiff now contends, a liquidated sum; it would only be due in case of a loss, and the acceptance of it would not bring plaintiff within the rule he relies upon. He is entitled either to a recovery upon his contract, or his salary in case of a loss. He was not entitled to a salary in any event. He has accepted his salary, and such

acceptance implies the truth of the allegations contained in the answer of the defendants that there was a loss upon his contract.

Judgment affirmed.

Crow, C. J., Gose, Parker, and Mount, JJ., concur.

[No. 10726. Department One. February 24, 1913.]

MELKER NILSSON, *Appellant*, v. A. P. MARTINSON *et al.*,
Respondents.¹

WORK AND LABOR—ACTION FOR SERVICE—IMPLIED CONTRACT—EVIDENCE—SUFFICIENCY. An implied contract to pay for clearing land is not shown, where it appears that plaintiff went upon the land of his son-in-law and used it for crops, from 1904 to 1911, without any request on the part of the defendant, or any demand for pay, or any offer to account for the products, on the part of the plaintiff, although crops were raised every year.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in instructions is harmless where the court should have taken the case from the jury and directed a verdict against the appellant.

TRIAL—INSTRUCTIONS. An instruction that jurors should follow their own consciences or whatever they believe to be the truth, irrespective of anything else in the case, is an abstract platitude, and erroneous as tending to mislead the jury.

Appeal from a judgment of the superior court for King county, Myers, J., entered March 22, 1912, upon the verdict of a jury rendered in favor of the defendants, in an action on contract. Affirmed.

Carl J. Smith, for appellant.

Edward Judd, for respondents.

CHADWICK, J.—Plaintiff brought this action to recover the value of labor performed in clearing and reducing to cultivation about four acres of an 80-acre tract of land belonging to defendants. He alleges that the work was done at the request of defendants, and is of the reasonable value

¹Reported in 130 Pac. 106.

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of \$993. Defendant A. P. Martinson, the only defendant served with process, answered, denying the allegations of the complaint, and alleged that plaintiff had gone on the land at his own request; that he cleared small parts where the soil was the richest and best and raised hay and vegetables, all for his own use and benefit; that no contract to pay was ever made or implied between the parties; that in February, 1911, plaintiff notified defendant that he was too old to do the work he had been doing; that accordingly defendant moved his family onto the land, and plaintiff made his home with defendant's wife, who is the daughter of the plaintiff, for about eight months, when plaintiff left, and a short time thereafter brought this suit.

The testimony of the plaintiff wholly fails to show any request on the part of the defendant, or any demand for any sum whatever for the work plaintiff had done between the years 1904 and 1911. It shows that he used the land as his own and never accounted, nor offered to account, to defendant for any of the products of the land, although the evidence shows that crops of hay and potatoes were raised in the year 1905 and in each year thereafter. The only evidence relied on to sustain plaintiff's case is his statement that "he promised he would always give pay for all the work that was performed on his ranch." This was in May, 1904, and before any work was done under the alleged contract. There is also the testimony of an unmarried daughter:

"Q. Did you overhear any conversation or conversations between Mr. Martinson and your father regarding that land? A. Yes, sir. Q. You may state to the jury what was said by Mr. Martinson, and what was said by Mr. Nilsson as well as you can remember. A. It was one day, it was very hot, and my father came home from work, he was clearing land and he sat down and he says, 'It is very hot work' and Mr. Martinson and Mrs. Martinson was there, and said,—and he says, 'We are paying you for the work you are doing.' Q. What land was it your father worked on? A. On Mr. Martinson's land. Q. When, about, was that conversation with

reference to the beginning of the work, or towards the end of the work? A. Well, it was just about the beginning. Q. The beginning? A. Yes. . . . Q. Now, this first conversation between your father and Mr. Martinson, when was that? A. Well, I couldn't really remember when it was. Q. What year? You have been here in the court room and heard the witnesses testifying, you heard it stated he first took hold of this land in the summer of 1904. A. Yes, sir. Q. When was it compared with that time, before or after that time? A. It was after that time. Q. How long would you say, was it that summer? A. No, sir; I believe it was in 1906. Q. You think when Mr. Martinson made that expression to him when he came in hot and tired, it was in the summer time? A. Yes, sir. Q. You think it was about two years after your father had been working on the land? A. Yes, sir; I think so."

This is wholly inadequate to prove a contract or to sustain the allegations of the complaint. Plaintiff had eighty acres rent free. Defendant, who is his son-in-law, had built a comfortable house for him to live in, paid the taxes, and met all the expenses of the land. Plaintiff had cows and chickens, raised hay and potatoes, and had for his pay all that he could make out of the land. He was, according to his own showing, being paid for his work. There is nothing even suggesting that he understood that he was to be paid in money. No contract, express or implied, is proved, or attempted to be proved. All this upon the plaintiff's case.

The defendant's evidence puts the case beyond the peradventure of a doubt. We shall not review it. No other verdict could have been rendered by the jury. It would have been the duty of the court to direct a verdict had a motion been made. This brings us to the errors assigned. The only assignments now material go to certain instructions given by the court to the jury. They are alleged to be bad, and they are bad. Those objected to are based upon a theory of the law that finds no warrant in the pleadings or the evidence, and if plaintiff had any case at all, would put an unwarranted burden of proof upon him. No purpose will be

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served by quoting them, for notwithstanding their inapplicability, they will not be regarded as harmful.

"If it affirmatively appears from the record that in no event can the complaining party recover upon the facts, errors in the instructions, however flagrant, may be regarded as harmless." Elliott, Appellate Procedure, § 642.

A verdict will not be disturbed for erroneous or inaccurate instructions where "the court could have properly instructed the jury to find as they did." *Walbrun v. Babbitt*, 16 Wall. 577; *Barth v. Clise*, 12 Wall. 400.

"It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action." *Probst v. Brock*, 10 Wall. 528.

See, also, 8 Cyc. 385, and cases cited.

The court instructed the jury that:

"This is the important thing, gentlemen of the jury, in this land of ours, when a case is submitted either to the jurors or the trial court, that the jurors or the trial court should follow their own consciences, irrespective of anything else in the case; follow your conscience or whatever you believe to be the truth in the case."

We feel warranted in saying that we agree with counsel for respondents that the instruction complained of is "an abstract platitude which had no particular bearing on the case," and was "superfluous." Such instructions should not be given. They tend only to confusion. If not actually telling the jury that it must be convinced to a moral certainty which would in many cases make verdicts impossible, it does encourage the jury to reject testimony which it has no right to reject, and to ignore all of the pertinent instructions theretofore given. The instruction, wherever questioned, has been held to be error, and would be now if it were possible to send the case back for a new trial.

Affirmed.

CROW, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 10870. Department One. February 26, 1913.]

LOUIS KNUTSON, *Respondent*, v. MOE BROTHERS,
INCORPORATED, *Appellant*.¹

EVIDENCE—TESTIMONY AT FORMER TRIAL—CERTIFICATION OF WRITING—NOTICE—ADMISSIBILITY. Under Rem. & Bal. Code, § 1247, providing that the testimony of an absent witness, given in at a former trial, when reported by a stenographer and certified by the trial judge upon three days' notice, may be given in evidence, it is not necessary that notice be given of an intention to recertify testimony that was certified by the trial judge to be used on an appeal.

EVIDENCE—HYPOTHETICAL QUESTIONS—VARIANCE—MATERIALITY. It is not a material variance between the facts of the case and a hypothetical question, that the plaintiff reached camp unaided by walking and crawling half a mile instead of being taken there; nor that he was attended by a physician at Seattle, instead of being taken home from Seattle; nor that he was "laid up" at home about a month, instead of "staying at home in bed for about a month."

TRIAL—OBJECTIONS TO EVIDENCE—SCOPE AND QUESTIONS RAISED. An objection to a hypothetical question of some length, and stating several hypotheses, in that it contained a "mass of irrelevant matter," and that the "hypothesis stated" is not supported by the evidence, is too general; since appellant should have pointed out the matter to be eliminated and wherein the "hypothesis stated" was not borne out by the evidence.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,000 for personal injuries sustained by a logger, struck on the head by a log, is so excessive as to show passion and prejudice, and should be reduced to \$2,500, where it appears that plaintiff returned to his work in less than a month and continued therein for nearly a year at an increased wage, without any complaint for injury to his back or permanent disability, or any treatment except for a scalp wound; and in a written statement for membership in a lodge, he represented that he was well and sound.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 27, 1912, upon the verdict of a jury rendered in favor of the plaintiff for \$5,000, for personal injuries sustained through the fall of a log from a car. Reversed, unless \$2,500 is remitted.

¹Reported in 130 Pac. 347.

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Peterson & Macbride, for appellant.*Martin J. Lund*, for respondent.

Gose, J.—The plaintiff in this action seeks to be recompensed for a personal injury sustained while employed by the defendant, in consequence of its alleged negligence. There was a verdict and judgment in his favor for \$5,000, which the defendant seeks to reverse or modify by this appeal.

The errors suggested are, (1) that the respondent was guilty of contributory negligence; (2) that the testimony of Bert Nelson should not have been admitted; (3) that an objection interposed to a hypothetical question should have been sustained; and (4) that the verdict was excessive. These questions will be considered in the above order.

The first inquiry was settled adversely to the appellant's contention on a former appeal upon substantially the same facts as are shown by the record on this appeal. *Knudsen v. Moe Brothers*, 66 Wash. 118, 119 Pac. 27.

After showing that Bert Nelson, who had testified in the former trial, could not be found, and the exercise of due diligence in endeavoring to find him, the respondent, having given three days' notice to the opposite party together with a copy of his testimony in the other trial, was permitted to read it in evidence. The statute, Rem. & Bal. Code, § 1247, provides:

"The testimony of any witness, deceased, or out of the state, or for any other sufficient cause unable to appear and testify, given in a former action or proceeding, or in a former trial of the same cause or proceeding when reported by a stenographer or reduced to writing, and certified by the trial judge, upon three days' notice to the opposite party or parties, together with service of a copy of the testimony proposed to be used may be given in evidence in the trial of any civil action or proceeding, where it is between the same parties and relates to the same matter."

The testimony at the former trial had been reduced to writing and certified by the trial judge, to be used on the

first appeal. The appellant's contention is that it was incumbent upon the respondent to give it three days' notice of his intention to have the testimony re-certified, and that having failed to do so and there having been no re-certification, the testimony was inadmissible. The statute does not require so useless a formality.

The respondent propounded a hypothetical question to a physician, covering one and a half pages of the printed brief. The objection was:

"Just a minute, now, before that is answered, we object to that question as, first, containing a mass of irrelevant matter which might have effect upon the opinion of the physician, yet it is not properly considered in a case of this character; and second, that the hypothesis stated is not supported by the evidence."

The argument is that the hypothetical question is not a fair statement of the material facts which the evidence tends to establish, and that it embraces facts not within the testimony. The respondent testified that, after he was injured, he succeeded in reaching the camp, a half mile distant, unaided, by walking and crawling, with intervals of resting. The hypothetical question assumed that he was taken to the camp. The variance was immaterial. He further testified that he was taken to his home from the camp and taken to Seattle the following day, where he was attended by a physician; but there is no testimony that he was taken home from Seattle, as the question assumed. This would seem too immaterial a circumstance to require a reversal. He also testified, and his wife corroborated his statement, that he "was laid up" at home for about a month. The question assumes that he "stayed at home in bed for about a month." The variance was a material one had it been properly called to the attention of the court.

It is the duty of counsel to frame his hypothetical question so as to fairly come within the scope of the testimony. Stated in another form, there must be evidence tending to prove

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the material facts assumed in the hypothetical question. The objection that the question contained "a mass of irrelevant matter," and that the "hypothesis stated" is not supported by the evidence, was not sufficiently specific to direct the attention of either the court or counsel to the substance of the objection. To say that a question of such length embraces a mass of irrelevant matter was too general to rise to the dignity of an objection. The court, in the exercise of the discretion which the law gives it (*State v. Peacock*, 58 Wash. 41, 107 Pac. 1022, 27 L. R. A. (N. S.) 702) would have been warranted in requiring the elimination of the immaterial matter embraced in the question, but the failure so to do neither benefited the respondent nor prejudiced the appellant. And the objection that the "hypothesis stated" is not borne out by the evidence, when there were several hypotheses, is equally unavailing. The appellant should have fairly pointed out wherein the hypotheses varied from the evidence. Had this been done, the court would have been afforded a basis for an intelligent ruling, and counsel could then have recast his question, or could have temporarily withdrawn it for the purpose of putting in evidence, if he had any, to meet the situation. This view has the support of the following authorities: 38 Cyc. 1388; *In re Barber's Appeal*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622; *Missouri Pac. R. Co. v. Hall*, 66 Fed. 868; *Burlington Ins. Co. v. Miller*, 60 Fed. 254. The reason for the rule is thus succinctly stated in the case last cited:

"Appellate courts have on many occasions condemned the practice of stating objections to testimony in language that is so general or obscure that it may not have served to advise the trial court, or the opposite party, of the precise nature of the objection intended to be urged and to be relied upon. A specification of the particular reasons upon which a party asks the trial court to exclude or to admit certain testimony is essential for three reasons: First, to prevent a violation of the fundamental rule that a litigant must abide in an appel-

late court upon the theory which he has advocated at *nisi prius*; second, to prevent an appellate tribunal from becoming something quite different from a court of review; and, lastly, that the opposing party and the trial court may be fairly advised of the force and nature of the objection intended to be urged, and have a fair opportunity to consider it, and, if need be, obviate it. *Insurance Co. v. Frederick*, 58 Fed. 144; *Turner v. People*, 33 Mich. 363, 382; *Shafer v. Ferguson*, 103 Ind. 90, 2 N. E. 302; *State v. Hope*, 100 Mo. 347, 13 S. W. 490; *Lewis v. Railroad Co.*, 123 N. Y. 496, 501, 26 N. E. 357; *Ward v. Wilms* (Colo. Sup.) 27 Pac. 247; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; Elliott, App. Proc. §§ 770, 779. While an objection to testimony for the reason that it is 'incompetent and immaterial' may be adequate in some cases, where the testimony is obviously or clearly inadmissible, yet, as every practitioner knows, it frequently happens that an objection in that form is not sufficient to advise the court or the opposite party of the ground on which the objection is predicated."

While the objection that the "hypothesis stated" is not supported by the evidence may be sufficiently specific in cases where the question embraces a single hypothesis which is clearly without the legitimate meaning of the testimony, yet it frequently happens, as in this case, that an objection in that form is altogether too wanting in precision to direct the mind of either the court or counsel to the vice sought to be eradicated.

The appellant, in support of the sufficiency of his objection, has cited *Frigstad v. Great Northern R. Co.*, 101 Minn. 40, 111 N. W. 838. It may well be doubted whether the objection was sufficient under this authority. We quite agree with the court in the *Frigstad* case that it is the duty of counsel to frame his hypothetical questions with care and accuracy, and that he should not be permitted to throw the burden of correcting its defects upon opposing counsel. The question here objected to was not carefully prepared, and it was not accurate. There is, however, a duty on objecting counsel. He must state his grounds of objection specifically, in order

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that the court may rule intelligently, keeping in view the all-essential fact that the promotion of justice is the object of all litigation.

The objection that the damages awarded by the jury and carried into the judgment by the court are excessive is meritorious. The respondent was injured on the 25th day of March, 1909. He returned to his work in less than a month, and continued to work for the appellant in his former position for nearly a year, at an increased wage on account of the raise in wages. He testified, that he resumed work on account of his necessitous circumstances; that he was not well, and that he had a boy to help him the last week he worked for the appellant. He also said, "Well, I am not well;" that his feet and back had troubled him ever since the injury; and that his back hurt him when he worked. After he left the employ of the appellant, he worked as a loader for about a month for another party; then worked as a fisherman, fishing for halibut with a helper, as he says, where he was required to lift heavy fish. In speaking of his present condition he said, "that his back is sore and limber," so that he cannot do any hard work; that his "feet are weak," and that he has not been "well or sound" since he sustained the injury. The day following the injury he called upon a physician at Seattle, who put a few stitches in his forehead where the scalp had been cut. This was practically all the treatment he received prior to the trial. On the 24th day of July, 1909, about four months after he sustained the injury, he applied for membership and benefits in the "Modern Woodmen of America." In his signed application he was asked: "Have you, within the last seven years, been treated by or consulted any person, physician or physicians in regard to personal ailments?" and answered: "No." He was asked: "Have you ever had any local disease, personal injury, or serious illness?" and answered: "No." He was asked: "Are you of sound body, mind, and health, and free from disease or injury?" and answered: "Yes." He was asked: "Has your

weight recently increased . . . or diminished?" and answered: "No." Dr. Teepell, a witness for the respondent, made an X-ray examination of the appellant's spine in May, 1912, and testified that he had a curvature of the spine, and that the eleventh rib had been wrenched from the backbone. He made a radiograph which was put in evidence. He had never seen the respondent before that day. His testimony as to the permanency of the injury was: "Well, my opinion is that it would be more or less permanent;" that the "injury to which he testified was caused by violence," and that it "could very easily cause the symptoms," and that the injury showed by the radiograph would interfere "to a certain extent" with his work, and that "it is rather difficult to say just to what extent." He further said that a curvature of the spine in adults is not infrequent. He also testified that, if the respondent worked the same as he had worked before he met the injury, he would say that the injury was not very serious. He further testified:

"Q. Assuming that the evidence here shows that he called for no medical treatment as to that portion of his body, the ribs, would that indicate to your mind that he was probably not injured there at that time? A. I assumed a few minutes ago that he had been injured in the ribs and treated for such. Q. I am asking you now, assuming that he had not been treated at all and did not ask for any treatment in that line, what would that indicate to your mind? A. That he had not any injury. Q. That is it. Ordinarily speaking then, a person that is suffering from a broken rib or ribs, he feels it at the time? A. Ordinarily, yes sir. Q. That is quite painful; isn't that right? A. Well, no not always. There are many cases where a fractured rib has been known, a patient goes about with some little inconvenience for some length of time. Q. Well, if that is the case, then, doctor, that he does not particularly experience any pain or trouble, isn't that of itself evidence that he was not very severely injured? A. One should say so, yes, sir. Q. Yes. You never saw this man before you took the X-ray? A. No, sir."

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Dr. Noble, a witness for the respondent, testified that he examined the respondent during the trial; that from the X-ray examination and from the symptoms he was led to believe that he had a "fractured rib and a twisted spine;" that it was due to some injury; that in his opinion he was not able to perform "the labor he did before;" "I do not think he is capable of doing logging work." He further stated that he had to rely upon the history of the case as given him by the respondent, and that "we have to rely to a certain extent upon the patient's words." The physicians who testified for the appellant said that there was no indication of a fracture of the rib; that he had a slight curvature of the spine, a condition commonly found in adults, and that there was no evidence of a present disability. A number of the witnesses for the appellant testified that, when the respondent returned to work, he made no complaint, and that he resumed his former position and worked the same as before. The record evidence shows that he resumed work on April 19, six days less than a month after his injury, and that he worked until the 16th day of March, 1910, a period of about eleven months. He was receiving \$3.50 per day when he met his injury, and after he returned to his work he was paid at the rate of \$4.00 per day while he remained in the employ of the appellant.

The writer has read all of the evidence in the case and we find, that the appellant resumed hard labor within three weeks after he was injured; that he continued in the employ of the appellant for a period of eleven months, working for it when it had work to do; that he received no medical aid, other than to have a few stitches put in his forehead, for a period of three years. This, supplemented by his own solemn written statement when he sought to become a member of the Woodmen's Lodge and to receive its benefits, forces the conclusion that the damages awarded by the jury are so excessive as to conclusively show passion and prejudice. We are always reluctant to interfere with the verdict of the

jury upon questions of fact, but when the facts are as recounted, a considerate regard for our duty requires that we should not permit the verdict to stand. We think a verdict of \$2,500 would have been liberal, and that the jury was not warranted in allowing a greater sum.

The case will be remanded, with directions to grant a new trial unless the respondent elects, within thirty days after filing of the remittitur below, to accept a judgment for \$2,500.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10668. Department Two. February 28, 1913.]

CHARLES JOHNSON, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. A judgment in condemnation proceedings for the purpose of ascertaining the amount of damages to abutting property by reason of a change of street grade is *res judicata* and a bar to a subsequent suit by a party thereto to recover damages therefor.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 27, 1912, upon granting a nonsuit, dismissing an action for damages to property. Affirmed.

Morrill, Chester & Skuse, for appellant.

H. M. Stephens and Bruce Blake, for respondent.

MAIN, J.—This is an action for damages to abutting property by reason of changing the grade and the regrading of a street. The plaintiff is the owner of lot 19, in block 5, in First addition to the West Riverside addition to the city of Spokane, which lot fronts on Clark avenue, one of the public streets of the city. On June 12, 1900, the city council passed

¹Reported in 130 Pac. 341.

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an ordinance which established the grade of Clark avenue, but the street was never improved under this ordinance by bringing the surface of the street to the grade line thus established. On January 14, 1910, an ordinance was passed by which the grade of Clark avenue was changed and re-established. This ordinance provided for the improvement of the street by grading, sidewalking, etc. The contract for this work was entered into on February 18, 1910, and thereafter the work was prosecuted. On July 28, 1911, while the work of regrading and sidewalking was in progress, the plaintiff in this action filed a verified claim with the city, demanding damages on account of the lowering of the surface of the street in front of his property to the grade line established by the ordinance of January 14, 1910.

On October 26, 1911, the city council passed an ordinance providing for the institution of a condemnation proceeding for the purpose of ascertaining the amount of damages to abutting property by reason of the changing and reestablishing of the grade of Clark avenue. Pursuant to this ordinance, condemnation proceedings were begun, a trial had, and judgment was entered therein on December 27, 1911. The plaintiff here was a party to that action and appeared therein by counsel. The judgment in the condemnation suit has never been vacated or set aside. During the month of January, 1912, the present action was begun on the claim that had been filed July 28, 1911. In due time the cause came on for trial. At the conclusion of the plaintiff's evidence, a motion for nonsuit was interposed by the defendant. The motion was granted, and dismissal of the action followed. The plaintiff has appealed.

The sole question presented is whether the judgment in the condemnation suit is *res judicata* as against appellant's right to prosecute the present action. To ascertain the amount of the damage which appellant's property would suffer by reason of the change of grade of Clark avenue was one of the purposes for which the condemnation action was

brought. The appellant appeared therein. It was his right and his duty to litigate in that action the very question which he is seeking to have determined in the present action. In *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757, a similar question was presented to this court, and the decision in that case is conclusive as against the appellant's right to maintain the present action.

The judgment will therefore be affirmed.

MORRIS, ELLIS, FULLERTON, and MOUNT, JJ., concur.

[No. 10881. Department One. February 28, 1913.]

CITY RETAIL LUMBER COMPANY, *Respondent*, v. TITLE
GUARANTY AND SURETY COMPANY, *Appellant*.¹

MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — ACTION ON BOND TO SECURE PERFORMANCE. No recovery can be had by a materialman on a contractor's bond given for the security of laborers and materialmen on public work, under Rem. & Bal. Code, § 1159, for ties sold to a contractor on street grading work, where the ties were used for a track to move dirt on three other contracts held by the contractor and not secured by the bond, and the ties were not entirely consumed in the work.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered May 9, 1912, upon findings in favor of the plaintiff, in an action upon a contractor's bond. Modified.

Frank Beam (Murphy & Wall, of counsel), for appellant.
Hogan & Graham, for respondent.

PARKER, J.—The plaintiff seeks recovery from the defendant upon a bond, executed by it as surety for William Dutcher to the city of Aberdeen, under Rem. & Bal. Code, § 1159, to secure performance on his part of a street improvement

¹Reported in 130 Pac. 345.

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contract which he had theretofore entered into with the city, which bond was also conditioned as follows:

"Now, therefore, if the above bounden principal, William Dutcher, . . . shall pay . . . all persons who shall supply such contractor . . . with provisions and supplies for the carrying on of the work contemplated in said contract . . . then this obligation to be void, otherwise to be and remain in full force and effect."

The cause proceeded to trial before the court without a jury, resulting in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

A careful reading of the entire record, which includes all of the evidence introduced upon the trial, convinces us that there is practically no room for controversy as to the controlling facts here involved, which may be summarized as follows: In July, 1910, the city of Aberdeen entered into contract with Dutcher for the improvement of portions of Spur, Tenth, and Broadway streets, by grading and constructing wooden sidewalks, curbs, and gutters thereon. Immediately upon the entering into of this contract, appellant, as surety for Dutcher, executed to the city the usual statutory bond, conditioned in the language above quoted, as required by Rem. & Bal. Code, § 1159. Thereafter respondent sold and delivered to Dutcher lumber amounting in value to \$681.33. This lumber was so furnished with the understanding upon the part of both respondent and Dutcher, that it was to be used in connection with the construction of the improvement as follows: \$390.79 worth of the lumber was furnished for and used in the construction of the sidewalks, curbs and gutters of the improvement, and actually went into and became a part thereof; \$290.54 worth of the lumber consisted of railway ties, which were furnished for and used in the construction of a temporary narrow gauge railway, over which dump cars were run for the removal of surplus dirt from the portions of the street being improved. The trial court found, among other things:

"That while said 'ties' did not actually go into the streets themselves so as to actually form a part of the improvement, yet the use of said 'ties' for the construction of the dump-car line above mentioned practically consumed the lumber comprising the 'ties' so that after the use of the lumber for 'ties,' as above mentioned, the lumber would have little or no value."

We cannot agree with this finding, if it have reference to the consumption of the ties in the construction of the particular improvement for which appellant executed the bond here sued upon, and we think that the question of the consumption of the ties in this improvement and the furnishing of them with a view that they were to be consumed therein becomes of vital importance here in determining appellant's liability upon its bond to pay for the ties. Mr. Davenport, respondent's manager, and its only witness upon the trial, testified as follows:

"Q. On July 30th, 1910, there were 1121 pieces 4x8 ties sold. Do you know what they were supposed to be used for? A. They were gotten to build a railroad to 10th, Broadway, and Spur. Q. Do you know whether or not those ties were used up in doing that work or were used for other purposes after that? A. I could not say. I presume they were used afterwards; I don't know . . . Q. Do you know whether or not there was an improvement at the other end of the line, the lower end? A. I think there was. Q. What was that improvement? A. I think that was 1st street. Q. So they made the track to extend from Spur & Broadway down to 1st? A. Yes. Q. That was a public improvement on 1st street? A. Yes. Q. Mr. Dutcher was doing both contracts? A. Yes."

This is the substance of all the information he gives us as to the purpose for which the ties were furnished and as to the use they were actually put to. Dutcher, the contractor to whom the ties were furnished, testified as follows:

"Q. Where were these ties used? A. On Spur, Broadway and 10th to run away the surplus dirt. Q. Were they used any place else? A. A few I guess were used on 11th. Q. How many contracts did you have at this time with the city of

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Aberdeen? A. I had four. Q. Did you use these same ties on all four contracts? A. I think I did. I used them with some old ones I had before I got these. Q. Did you put the old ones down first or later? A. Later; I used the new ones first and the old ones afterwards. Q. And these ties were used on the 1st street improvement as well? A. Some of them were. Q. All of them? A. No, we used most of the old ones on 1st street. Q. At the time you were taking down Spur you were filling in 1st with the dirt? A. Yes. Q. So that the cars were worked over 1st as well as Spur street? A. I suppose you might call it that way. Q. Did you make use of these ties on 11th street? A. I don't think we did. Q. You did not haul any cars from 11th street over this railroad? A. Yes, but we did not use those; we had some old planks. Q. The dirt hauled from 11th street all went over this track, over these ties? A. Yes. Q. And you had the E street contract at this time? A. Yes. Q. State whether the dirt that went into E street went over this track. A. It did. Q. Which was the largest contract of these four? A. 1st street. Q. 1st street had more yards of dirt? A. Yes. Q. Which was the smallest yardage as far as it went over this track? A. E street was the smallest. Q. And was Spur next? A. I cannot remember whether Spur was larger than 11th or whether 11th was the largest. Q. But this track was used for all four jobs? A. Yes, to run the dirt from the hill down. Q. Were these ties used up? A. They were laying where I laid them with the rails on the last I seen them. Q. Do you know what became of these ties? A. I don't know of my own knowledge; hearsay is all I know about that. Q. Did they become part of this work; that is, are they still up there in the work? A. They are not where I left them, I know that. Q. You think the ties were good when you quit there, were they? A. Of course they were second hand material. I don't know what they were good for; they might be used again. Q. In your idea they were good enough to run a track over? A. Yes. Q. You don't know what became of them? A. No, not of my own knowledge I don't."

This testimony is uncontradicted. Dutcher became insolvent about the time these contracts were completed, leaving, among other debts unpaid, that which was incurred in the purchase of the ties and the other lumber mentioned. The

ties were thereafter sold by Dutcher's trustee in bankruptcy for \$12. Thus we think it is established that the ties were actually used by Dutcher in the prosecution of three other contracts, at least one of which was a larger contract than the one for which appellant executed this bond, and thereafter the ties proved to be still of some value, even at a bankrupt sale. We also think that it is a fair conclusion from the entire evidence that respondent's manager knew, at the time he furnished the ties, that they would not necessarily be consumed in making this particular improvement, though they were furnished with a view to being used thereon.

Counsel for respondent rest their contention as to appellant's liability for the debt incurred by Dutcher in the purchase of these ties principally upon our decision in *National Surety Co. v. Bratnober Lum. Co.*, 67 Wash. 601, 122 Pac. 337. In that decision we reviewed at considerable length the law upon this subject, noticing the distinction between the provisions of Rem. & Bal. Code, § 1159, and the general lien statute, holding that certain items are recoverable upon bonds given under this section which would not be recoverable under the general lien statute. Relying upon the broader language of this section and our view of it as expressed in that decision, counsel for respondent insist that these ties constituted an item recoverable upon the contractor's bond, given for the purpose of protecting persons supplying the contractor with provisions and supplies. A careful reading of that decision, however, will show that it involves, (1) fuel for steam shovel, (2) the service of teams with drivers, and (3) feed for horses, all furnished for the carrying on of the work in question, and all necessarily entirely consumed in the prosecution of the work. The fuel, service, and feed, in a sense, did enter into and become a part of the finished structure, possibly not a physical part of it in the sense that material actually going into the structure would, but in the sense that labor performed upon the structure would. In the recent case of *Standard Boiler Works v. National Surety Co.*, 71 Wash. 28,

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127 Pac. 573, we held that the expense of making repairs upon a steam shovel which was used in prosecuting public work was not secured by the contractor's bond given under this section, upon the theory that such repairs were not work going into and becoming a part of the finished structure, because they were not necessarily all consumed therein, but became a part of the machinery or equipment which the contractor is presumed to be provided with for the purpose of carrying on his work. The evidence in this case clearly shows, as we have noticed, that these ties were in like manner a part of the equipment of the contractor, and not only were not such material as was consumed in the prosecution of the work, but plainly were such material and furnished under such circumstances as to show that it was not contemplated by the parties that they would be consumed in the prosecution of the work. We are unable to see that these ties performed any office different in principle from that performed by any other tool or appliance used in the prosecution of the work, though they may have been of such nature as to become very materially lessened in value in the prosecution of the work. It may be well doubted whether a tool or appliance which becomes entirely worn out in a particular contract of this nature would come within the protection of a bond given under § 1159, though we need not express our opinion upon that question at this time.

The judgment of the trial court is reversed in so far as it awards recovery against appellant for the \$290.54 incurred in the purchase of the ties, and it is directed that the judgment be corrected accordingly.

CROW, C. J., CHADWICK, GOSE. and MOUNT, JJ., concur.

[No. 10786. Department One. February 28, 1913.]

CATHERINE BOYD, *Respondent*, v. C. A. PRATT *et al.*,
Commissioners of the Industrial Insurance
*Department, Appellants.*¹

MASTER AND SERVANT—INDUSTRIAL INSURANCE—DEPENDENTS—STATUTES—CONSTRUCTION. Under the industrial insurance act, Laws 1911, p. 357, § 5, sub. 3, providing for a monthly payment to a dependent of a deceased workman, not exceeding \$20 a month, and that, if the workman is under age and unmarried, the parents shall receive \$20 per month for each month until the time of his majority, a parent who is also a dependent is entitled to the monthly payment during the continuance of dependency, and not merely to the time of majority; the latter provision being intended for nondependent parents.

SAME—APPEALS—ATTORNEY'S FEES. Under § 20 of the industrial insurance act (Laws 1911, p. 368), providing that on appeal from the decision of the department, the court shall fix a reasonable attorney's fee, and for appeals from the superior court to the supreme court as in other civil cases, the power to allow attorney's fees is limited to the superior court.

Appeal from a judgment of the superior court for King county, Main, J., entered September 23, 1912, upon findings in favor of the plaintiff, reversing an order of the industrial insurance department, on appeal from the order by a claimant. Affirmed.

The Attorney General and *S. H. Kelloran, Assistant*, for appellants.

Brady & Rummens, for respondent.

CHADWICK, J.—The only question involved in this case is one of statutory construction. James Boyd, aged nineteen years, was killed while in the employ of the Pacific Coast Coal Company. He had, for about eighteen months, contributed to the support of his mother. That she was dependent upon him, is admitted. In due time Catherine Boyd, the mother, filed a claim with the industrial insurance department,

¹Reported in 130 Pac. 371.

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and an order was entered allowing her \$20 per month until the time when James Boyd would have arrived at the age of twenty-one years. From this order, an appeal was taken to the superior court where the order of the department was reversed, and an order allowing \$20 a month, so long as the dependency continued, was entered. From this order, the department has appealed.

Both the department and the respondent rely upon the same statute, subd. 3 of the compensation schedule, being § 5 of the act of March 14, 1911, relating to compensation of injured workmen. The statute, so far as it is pertinent to our inquiry, reads as follows:

“If the workman . . . leaves a dependent . . . a monthly payment shall be made to each dependent equal to fifty per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed \$20 per month. If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive \$20 per month for each month after his death until the time at which he would have arrived at the age of twenty-one years.” Laws 1911, p. 357, § 5, subd. 3.

We think the interpretation of the statute adopted by the lower court is correct. It is quite clear to us that the legislature must have intended that the first clause quoted should apply to cases of dependency, while the last clause refers only to cases of nondependency. This construction is in keeping with the spirit and object of the law; that is, to protect the injured and to save dependents from becoming public charges. To hold that an allowance given because of dependency is to be cut off arbitrarily at a time when the deceased would have attained the age of twenty-one years, would defeat the humane purposes of the statute, for the dependency would not then cease, but might continue over a period of years. The second clause seems to have reference to that principle which, under

the common law, gave a parent the right to demand and receive the wages of a minor child.

As suggested by counsel, any other construction would lead to an absurd result. The act being passed for the purpose of compensating dependents, the present order of the department would deny compensation if the death occurred one day before the deceased was twenty-one; but if it occurred one day after, the compensation would continue as long as the condition lasted. The material object of the statute was to protect dependents, and not to fix arbitrary limitations.

Section 20 of the act provides that:

"It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case, and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the superior court as in other civil cases." Laws 1911, p. 368, § 20.

The court below fixed an attorney's fee of \$60, to be paid to the attorneys for the respondent. We are asked to make a more liberal allowance inasmuch as respondent has been put to the expense and delay of an appeal. The only warrant in the law for fixing an attorney's fee at all is to be found in the statutes just quoted. The power to fix fees is there limited to the superior court. The only rights that can be claimed on appeal to this court are such as are given by the general appeal statutes, the provision fixing our right of review being: "Appeal shall lie from the judgment of the superior court as in other civil cases." We find nothing in our appellate procedure which would warrant us in allowing an attorney's fee in this or similar cases. The motion for an additional fee is denied.

Judgment affirmed.

Crow, C. J., Gose, Mount, and Parker, JJ., concur.

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Opinion Per ELLIS, J.

[No. 10957. Department Two. February 28, 1913.]

W. R. PARKER *et al.*, *Appellants*, v. M. B. BRUGGEMANN *et al.*,
Respondents.¹

FRAUDS, STATUTE OF—BROKER'S COMMISSIONS. A verbal contract for a broker's commissions, made by one who was equitably a joint owner of the property, is within Rem. & Bal. Code, § 5289, requiring contracts for a broker's commissions to be in writing, at least if the broker knew or should have known of the fact of such joint ownership.

BROKERS — ACTION FOR COMMISSIONS — EVIDENCE — SUFFICIENCY. Where brokers did not have an exclusive contract, they cannot recover commissions, in the absence of proof that the purchaser was produced by them or that the sale was the result of their efforts.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 22, 1912, dismissing an action on contract, after a trial to the court. Affirmed.

John P. Hartman, for appellants.

Douglas, Lane & Douglas, for respondents.

ELLIS, J.—Action for a balance of commissions claimed to be due upon an exchange of real estate. The plaintiffs were real estate brokers, operating in Island county, Washington. The defendants were doing a general real estate business in the city of Seattle. The plaintiffs had listed for sale a tract of land on Whidby island, containing about 549 acres. They approached the defendants with a view to selling them this land at a price of \$15 an acre, and were informed that the defendants did not have sufficient money to make the purchase, but would endeavor to get some one to go in with them, put up the money, and buy the land. Such an arrangement was finally made by the defendants with one Ernest Carstens, a banker of Seattle, who advanced \$2,000, took the title in his own name, and gave a mortgage upon the land for the balance of the purchase price, with the under-

¹Reported in 130 Pac. 358.

standing that he was to be repaid his money with interest, and he and the defendants would be joint owners of the land subject to this charge, and would share equally in any profits made upon the venture. The defendants were to have the management of the land, and endeavor to make a sale of it so as to realize a profit for themselves and Carstens. Carstens testified to the same agreement. This agreement seems to have been verbal; or, if any memorandum of it was made, it was never recorded. The plaintiffs claim that they knew nothing of this agreement, and thought Carstens was purchasing for himself alone, and that the defendants were merely his agents. The plaintiff Parker, however, in his testimony referred to the sale as a sale to the defendants and Carstens. Moreover, the plaintiffs brought a prior action for this same commission against the Bruggemanns and Carstens as owners, and took a voluntary dismissal. We think the evidence at least tends to justify a belief that the plaintiffs knew the nature of the defendants' agreement with Carstens.

After the transfer of the land to Carstens, in March, 1910, the plaintiffs and the defendants entered into a verbal arrangement to again sell the lands, the plaintiffs to act as respondents' agents at Oak Harbor, Whidby island, and to receive as their commission ten per cent of the sale price. Both parties concede that nothing was said as to the agency being exclusive. So far there was little dispute as to the facts. There was, however, as to the following particulars, a sharp conflict in the evidence. Both the plaintiffs testified that this arrangement was unlimited as to time, while both the defendants testified, that it was limited to a period of six months from the transfer to Carstens; that the plaintiffs represented that they could sell in three to six months, but wanted an agreement for one year; that the defendants refused to give any written agreement, but did agree verbally that, if the plaintiffs sold the land within six months, they would be allowed a commission of ten per cent. The plain-

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tiffs testified to the effect that they were merely to aid in making sales, and were to receive their commissions on sales made to any purchaser sent to them by the defendants to be shown the land. The defendants testified in effect that the commissions were to be paid only on sales to purchasers procured by the plaintiffs. Circulars were sent out by the defendants, advertising the advantages of the land and referring to the plaintiffs as resident agents. When these circulars were sent out, is not made plain, but that they were still in circulation when the transaction upon which the commission is claimed took place, seems clear.

Within six months after this agreement was made, the plaintiffs, through their own efforts, found a purchaser and sold thirty acres of the land for \$50 an acre. The sale was approved by the defendants, and the plaintiffs were paid \$150 commission out of the purchase price. In order to facilitate further sales, the defendants, apparently at the plaintiffs' suggestion, had the remaining land surveyed into forty-acre tracts, the defendants paying the expense of the survey. No further sales were made within the six months, and the defendants testified that, at about the expiration of that time, they verbally notified the plaintiffs that the arrangement was at an end. Both of the plaintiffs denied that any such notice was given. After the expiration of the six months, the defendants were approached by West & Wheeler, a real estate firm of Seattle, with an offer on the part of one Murphy, a client of the last mentioned firm, to exchange certain real estate in Seattle for the remaining 519 acres of the Whidby island land. The defendants and Carstens examined the Seattle property and were satisfied to make the exchange, assuming a \$6,000 mortgage upon it if Murphy would assume a mortgage for something more than that amount upon the land. The exchange was finally made on these terms. Prior to this time, Wheeler and the two defendants had visited the land and gone over it in company with the plaintiff Parker. In February, 1911, Wheeler and

Murphy visited the island and examined the land. Wheeler testified that Parker, of his own accord and without request from either Wheeler or Murphy, went with them to the land. This seems to have been all that was done by either of the plaintiffs in connection with this exchange, except that when the deeds in exchange were made, Parker had the deed of the land and a power of attorney recorded and the abstract extended to show these, the fees being paid by the defendants. The defendants paid West & Wheeler a commission of \$500 for their services in connection with the exchange, but refused to pay the plaintiffs any commission thereon. The Seattle property exchanged for the land was estimated at a value of about \$25,000. The plaintiffs sued for a commission of \$2,604. The cause was tried to the court without a jury. The court, after hearing all of the evidence, dismissed the action and awarded the defendants their costs. The motion for new trial being overruled, the plaintiffs have appealed.

The appellants contend that the respondents were interested in the land merely as agents for Carstens, and only to the extent of a commission on any sale, to be measured by one-half of the net profits; that therefore, under the rule announced in *Orr v. Perky Inv. Co.*, 65 Wash. 281, 118 Pac. 19, and followed in *Leigh v. Yancey*, 67 Wash. 18, 120 Pac. 512, holding valid verbal agreements between real estate agents to divide commissions, they were entitled to the commission verbally agreed upon in this case. The respondents contend that, under the evidence, they were joint owners with Carstens, and as such managing the joint enterprise for themselves and Carstens, and that therefore the verbal agreement to pay a commission, even if held to apply to the exchange in question, was unenforcible as falling within the purview of the statute, Rem. & Bal. Code, § 5289, requiring an agreement employing a broker to sell real estate to be in writing. Unquestionably, if the respondents and Carstens were joint owners of the land, and if the appellants knew or should have known that fact, the agreement to pay the com-

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mission could only be proved by a written contract, and the respondents' contention must be sustained under the uniform decisions of this court. *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473; *Briggs v. Bounds*, 48 Wash. 579, 94 Pac. 101; *Ross v. Kaufman*, 48 Wash. 678, 94 Pac. 641; *Foote v. Robbins*, 50 Wash. 277, 97 Pac. 103; *Broderius v. Anderson*, 54 Wash. 591, 103 Pac. 837.

While the evidence seems plain that the respondents were in fact equitably joint owners with Carstens, it is not entirely clear that, at the time of their agreement with the respondents, the appellants knew of that fact, though the evidence points that way. We find it unnecessary, however, to decide just what effect a lack of such notice would have upon the agreement, since in any event it was incumbent upon the appellants to prove, by a preponderance of the evidence, a contract extending over the time when the exchange was made, exclusive in its character and entitling them to a commission upon sales to purchasers not procured by themselves and on sales of which they were not the efficient cause. We think the evidence wholly fails to establish these things. In our summary we have touched upon every material fact adduced. On all of these points, save one, the evidence as to what the agreement was presents a direct conflict. There was no evidence that the appellants' agency was exclusive. While the testimony of the appellants that the agreement was not limited to six months was to a slight degree corroborated by the circulars designating them as resident agents, that circumstance had no tendency to establish an exclusive agency in the face of the admission that nothing was said on that point. And again, while the appellants testified to the effect that they were to earn their commissions merely by showing the land to purchasers by whomsoever found, they were directly contradicted in this by the respondents, who, so far as we can know from the printed record, were as much entitled to credit as were the appellants. There was no claim that the appellants produced Murphy as a prospective pur-

chaser or person willing to make the exchange. There was no evidence that they were the procuring cause of the exchange. These things were clearly attributable to West & Wheeler. In the absence of proof of an exclusive agency, proof that Murphy was produced by them, or that the exchange was the result of their efforts, was indispensable to a recovery on their part.

Even assuming that the respondents were merely agents for Carstens, and that the agreement sued on was still in force when the exchange was made, the plaintiffs signally failed in their proof as to these other elements essential to their case.

The judgment is affirmed.

CROW, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10460. Department Two. February 28, 1913.]

FRED HOFREITER *et al.*, Respondents, v. W. W. SCHWABLAND
et al., Appellants.¹

TROVER AND CONVERSION—TRIAL—INSTRUCTIONS. In an action for the conversion of a house, built by partners with joint funds, upon the separate property of the plaintiff, and which, on dissolution of the partnership, was to be divided as personalty, the sole issue being whether defendant's half interest in the house was included in an exchange of properties and passed to the plaintiff, an instruction on the subject of common law fixtures, and casting the burden of proof of ownership of the house on the defendant, is misleading and erroneous.

TROVER AND CONVERSION—MEASURE OF DAMAGES. In an action for the conversion of a house, removed from plaintiff's land, the measure of damages is the value of the house at the time of its removal, with interest, and not the value of the use of the house on the premises from the time of its removal.

APPEAL—RECORD—WRITTEN INSTRUCTIONS. Instructions wholly in writing are part of the record on appeal, without being incorporated in the bill of exceptions or statement of facts.

¹Reported in 130 Pac. 364.

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Opinion Per FULLERTON, J.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Exceptions to instructions specifying the paragraphs by number are sufficient.

Appeal from a judgment of the superior court for Benton county, Holcomb, J., entered September 28, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Reversed.

H. B. Noland, for appellants.

John E. Ryan and *Grover E. Desmond*, for respondents.

FULLERTON, J.—The respondents as plaintiffs recovered against the appellants for the value of a dwelling house, alleged to have been wrongfully removed from certain lands of the respondents by the appellants and converted by the appellants to their own use. The facts out of which the controversy arises are in the main undisputed. On and prior to January 9, 1908, the respondent Fred Hofreiter and the appellant William Given were partners in a restaurant business, in the city of Seattle. They, at the same time, severally held contracts with the state of Washington for the purchase of certain lands, situated near the Columbia river, in Benton county. Being desirous of improving the lands, they, together with one Anthony Hofreiter, on the date above given, entered into a contract in writing, by the terms of which each of the parties agreed to advance a certain sum of money to be expended on the lands by Anthony Hofreiter in making improvements thereon and in bringing the lands under cultivation. The contract was indefinite as to its duration, but contained a clause providing that, upon its termination for any cause whatsoever, an inventory should be taken of all property then upon the land, "including machinery, pipes, buildings and fixtures," and the value of the same appraised and divided equally between the parties to the contract.

Acting pursuant to the agreement, the parties advanced considerable sums of money which were expended on the land

in the erection of buildings, the construction of irrigating works, and in preparing the land for cultivation. The buildings were erected on the tract belonging to the respondents, and consisted of a dwelling house, a barn, a house for a pumping station, and various outbuildings. The parties also acquired personal property of a considerable value. This consisting of a team of horses, with harness, fluming for irrigating purposes, and such machinery, implements and tools as are usually kept by farmers and gardeners.

After the business had progressed for a time, Anthony Hofreiter sold his interests to the respondent Hofreiter and the appellant Given. The respondent at the trial, in describing the interests in the property of the respective parties after this sale, used this language:

"The house referred to and for which I am claiming damages, was entirely constructed and built from funds contributed by defendant Given, Anthony Hofreiter and myself, and after Anthony sold out Mr. Given and myself were equal owners in the house. The pump, pump house, barn, fluming, teams, harness, machinery and equipment of every kind thereafter belonged to Mr. Given and myself equally. It had all been purchased from common funds."

Later on, Hofreiter and Given agreed to dissolve their partnership and divide their partnership property. As a basis for doing so, they valued the restaurant at twelve hundred dollars and the farm property at fifteen hundred dollars. After this appraisement had been made, Given offered Hofreiter his choice of properties, stipulating that the person taking the farm property should pay to the other one-half the difference between the appraised value of the two properties. Hofreiter chose the restaurant, and Given took the other property, paying Hofreiter one-half the difference between their appraised values.

The sole difference between the parties, and the sole question at the trial, was whether the house passed to Given with the other common property on the farm in the exchange.

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Hofreiter testified that the house was not included in the property set over to Given, while Given testified that it was so included. In submitting this issue to the jury, the court gave therein, among others, the following instructions:

“(4) The defendant Given contends that the ownership of the house in dispute was severed from the ownership of the land, not a permanent fixture thereon and that he and plaintiffs were joint owners thereof and at the time of the settlement he was given the house by plaintiff, I instruct you that the burden of proof as to the establishing of both of his contentions by a fair preponderance of the evidence is upon the defendant and if you believe from the evidence that the defendant has not proven that the ownership of the house was severed from the soil, and that he was expressly allowed the house by the plaintiff in the settlement, by a fair preponderance of the evidence then your verdict must be for the plaintiff.

“(5) You are instructed that the original contract between the parties provided that all buildings on the land owned by the plaintiff herein was to be considered personal property as between the said parties, at least until such time as the contract should be by them terminated, and a division or distribution made.

“If, therefore, the evidence shows that the original contract shown here in evidence and not disputed, was terminated, then it is still incumbent on the defendant Given, to show by a fair preponderance of the evidence, that he became the owner of the building in question, and remained such until the time when it is alleged that he sold it and caused it to be removed from the land.

“(6) In determining whether the buildings herein in dispute were personal property or part of the land to which it was annexed, I instruct that you shall be governed by the intention of the parties to make or not to make the same a permanent part of the land at the time of its erection, or at the time of any settlement, and in determining the intention of the parties you shall take into consideration besides their testimony, the purpose for which it was erected to be used, the size and character of the building, the manner of its annexation to the soil, its use in application to the property on which it was erected, and the effect its removal would have

on the land. If from the foregoing tests you decide it was the intention of the parties to make the same a permanent fixture to the land in the sense that buildings are considered permanent then you shall find that the building was part of the land.

“(8) I instruct you that if you find for the plaintiff the measure of damages would be the value of the house and the value of the use thereof on the premises from the time of its removal to date.”

Under the issues as made by the evidence, we are constrained to think each of these instructions erroneous and misleading. There was no dispute that as between the parties this house was personal property, as distinguished from a common law fixture, to the same extent that all the other property on the farms was personal property. Hofreiter himself testified that the house was built with their common funds, that it was erected on his particular land merely as a matter of convenience, that it was their common property at the time of the exchange, and his sole claim to the house is that it was awarded him in the exchange. Any reference to the doctrine of fixtures was therefore out of place and had a tendency to mislead the jury. So also, since Hofreiter was the plaintiff, and asserting the right to recover, the burden was upon him to establish by a preponderance of the evidence a right of recovery.

The second of the instructions is erroneous in that it places the burden upon Given to establish his ownership of the house. As we have stated there is no dispute that at the time of the exchange he owned a half interest in the house, and the sole question was whether he was given the other half interest in the exchange or whether his half interest went to Hofreiter. On this issue, since Hofreiter was seeking affirmative relief, the burden of proof was on him to establish the facts necessary to a recovery, not on Given to controvert his right.

The third of the instructions quoted (numbered 6) is erroneous in that it assumes that the house was possibly a fix-

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ture, whereas, as we have stated, the law of fixtures had nothing to do with the issues. The house was owned jointly by the respondents and the defendant Given. An exchange of property was made by which the ownership of the house either passed to Hofreiter or passed to Given. If it passed to Hofreiter, then Given wrongfully removed it; if it passed to Given, he had an implied license to remove it within a reasonable time, and his removal of it was rightful and not wrongful. An instruction as to the law of fixtures, therefore, was not pertinent.

The fourth instruction is erroneous in that it does not lay down a correct rule for the measure of damages. This being an action for conversion, the measure of damages was the value of the house at the time of its removal, with interest at the lawful rate on such value from the time of the removal to the time of the trial. The value of the use of the house on the premises from the time of its removal to the time of the trial is not recoverable in this form of action.

There was no error in the rulings on the admission of evidence.

We have not overlooked the respondents' objections to the sufficiency of the record on appeal. But instructions given wholly in writing and filed in the cause are a part of the record and may be brought to this court over the certificate of the clerk; they need not be embodied in a bill of exceptions or statement of facts. Rem. & Bal. Code, § 395. The charge to the jury was in writing and the exceptions were taken "by specifying by numbers of paragraphs . . . the parts of the charge excepted to," and were sufficient under the statute. Id., § 384.

The judgment is reversed, and the cause remanded with instructions to grant a new trial.

MOUNT, MORRIS, ELLIS, and MAIN, JJ., concur.

[No. 10588. Department Two. February 28, 1918.]

GUSTAVE LEWIS, *Respondent*, v. SEATTLE TAXICAB COMPANY,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—USE—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is not contributory negligence, as a matter of law, for a pedestrian, about to board a street car, to fail to look for and see an approaching automobile, seventy-five feet away, or to fail to keep a lookout for it while crossing the street, where the pedestrian was in full view of the driver, and there was room for the driver to turn to one side (MORRIS, J., dissenting).

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 19, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by a pedestrian struck by an automobile. Affirmed.

Brightman, Halverstadt & Tennant, for appellant.

Chas. M. Fouts, for respondent.

FULLERTON, J.—The respondent was struck by an automobile, driven by a chauffeur of the appellant, and received injuries for which he recovered in the court below. In this court but one principal question is urged in the argument, namely, was the respondent guilty of negligence contributing to his injury.

The respondent was injured while on Yesler Way, in the city of Seattle, at a point near the junction of the Way and James street. At this place, cars from various parts of the city have a common track, and stop there to receive and discharge passengers. The respondent approached the place at about 5:15 o'clock in the evening, intending to take a car for his home. There were two cars then standing on the car tracks, neither of which were bound for the vicinity of his residence, and he waited the approach of the proper car.

¹Reported in 130 Pac. 341.

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Shortly thereafter his car was seen approaching, and he alternately looked at it and at the cars then standing on the street to see whether the latter moved out before the other car approached, as it made a difference as to the place his car would stop whether the cars then on the track remained there or moved out before his car arrived. Finally concluding that the car would stop further down the street than its usual stopping place, he started in that direction, walking diagonally across the street from the place where he left the sidewalk. He had gone perhaps fifteen feet, and was probably ten feet from the sidewalk, when he was knocked down by the appellant's automobile, which approached him from behind. He testified that, before leaving the sidewalk for the street, he looked in the direction from which the automobile approached, and that in looking at the standing street cars his field of vision naturally took in its line of approach, but failed to see it, and that he did not again look in that direction after leaving the walk before he was struck by the automobile. The jury, however, in answer to special interrogatories returned with their general verdict, found that he could have seen the automobile prior to leaving the sidewalk had he glanced in the direction from which it was approaching, and, also, that after he left the sidewalk and prior to being struck, there was nothing to prevent him from seeing the approaching automobile had he looked in that direction. The evidence was conflicting on the question whether or not any alarm was sounded as the automobile approached the respondent; and in conflict, also, as to the distance the car was from the respondent at the time he left the walk, and as to the speed at which it was running. There was, however, evidence in the record from which the jury could have found that no alarm was sounded and that the automobile was upwards of seventy-five feet from the respondent when he left the walk, and that it was running at a speed of from eight to twelve miles an hour.

The appellant does not dispute that the evidence was sufficient to take the case to the jury on the question of the negligence of the chauffeur, but contends that the act of the respondent in stepping into the street and starting across the same without looking for approaching automobiles, or looking so carelessly as to fail to see one approaching him at a distance of seventy-five feet, was such negligence as to prohibit a recovery on his part on the doctrine of contributory negligence. But it has seemed to us that the trial judge rightfully submitted the question to the jury. The respondent did not step from the street immediately in front of the automobile, nor did he in crossing the street any time obstruct its path. He was as much in the view of the driver of the automobile as the automobile was in his view, and as there was room to pass him on either side, we think it too much to say, as a matter of law, that he was required to take notice of the particular part of the street the automobile driver desired to use, and keep off that particular part. We think it was a question for the jury to say whether, under the circumstances, he did not have the right to assume that an automobile coming towards him from a direction opposite to that in which he was going would pass him on one side or the other instead of running him down.

On the question of the degree of care required of persons while crossing public streets used by passing vehicles, the appellant cites from this and other courts a number of cases of injury caused by railroad trains and passing street cars; but it is at once apparent that these cases can hardly be said to be in point except as they may state general principles. The degree of care required of a pedestrian crossing a railroad or street car track is much higher than is the care required of one crossing an ordinary public street where only passing teams or automobiles are to be encountered. Railroad trains and street cars must move on a fixed track, and the track is, for that reason, at once a warning of danger and a marking of the zone of safety; the cars are heavy and

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cumbersome and cannot turn aside to avoid a collision or be brought quickly to a stop when once in motion; hence the persons directing the movements of such cars are limited in their powers to protect persons found upon the track. But this is not true with reference to ordinary vehicles. The driver of these has freedom of choice as to the part of the street he will drive them upon; they can be turned quickly to one side or the other, and are capable of easy control otherwise. As to these, therefore, the footman may rely on the presumption that, so long as he occupies one place or pursues a given course, he need not be run into, and to fail to keep a lookout for the approach of such vehicles is not necessarily want of care. The degree of care required of such a person of course varies with the circumstances. It depends largely upon place and upon the condition of the street; whether the street is crowded with traffic or comparatively free therefrom; whether he enters the street at a place usually used by travelers on foot, and perhaps on many other conditions, but the degree of care required is ordinary care under the circumstances, and this as we say may be vastly different from ordinary care with reference to crossing fixed tracks upon which railway or street cars are operated.

Neither do we think the case of *Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313, in point with the contention of the appellant. That case was reversed and remanded because the court thought the jury had not determined the question of the injured person's contributory negligence, not that he was guilty of contributory negligence as a matter of law.

The special findings of the jury are not inconsistent with the general verdict. Failing to look for an approaching automobile before stepping into a street to take passage on a street car at the car's usual stopping place, or failing to look for an automobile while on the way to such a car, is not negligence as a matter of law under all circumstances, and we do not think the facts in the case before us justify the

conclusion that it was negligence as a matter of law in this instance.

The judgment is affirmed.

MOUNT, ELLIS, and MAIN, JJ., concur.

MORRIS, J. (dissenting)—I dissent. The automobile came from the east, while respondent was walking southwest. The right front wheel of the automobile ran over the right foot of respondent as he advanced it for an additional step. It will thus be seen that part of the automobile passed a part of respondent's body before it hit him. A second later and respondent would have walked into the machine. I am convinced respondent centered his entire attention on the street cars and gave no attention at all to other traffic on the street. Had he done so, he would not have been injured.

[No. 10122. Department One. February 28, 1913.]

DOUGLAS COUNTY, *Respondent*, v. GRANT COUNTY,
Appellant.¹

COUNTIES—DIVISION—APPORTIONMENT OF ASSETS AND OBLIGATIONS. In the absence of any statute, when a new county is created from territory of an old county, the latter retains all its assets and assumes all existing obligations.

SAME—POWERS OF LEGISLATURE. The division of counties and apportionment of assets is solely a legislative function.

COUNTIES—DIVISION—INDEBTEDNESS—APPORTIONMENT ON FORMATION OF NEW COUNTY. Upon the formation of a new county from territory of another county, under a special act complete in itself, requiring the new county to assume a certain proportion of the indebtedness of the old county but containing no provision as to the assets of the old county, the new county is not entitled to share in such assets; and the general statutes, Rem. & Bal. Code, §§ 3826, 3827, authorizing the two county auditors to agree upon the proportion of debts that the new county shall pay, have no application.

¹Reported in 130 Pac. 366.

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Opinion Per CROW, C. J.

Appeal from a judgment of the superior court for Douglas county, Grimshaw, J., entered September 8, 1911, upon findings in favor of the plaintiff, upon the pleadings, in an action to enjoin the issuance of county warrants. Affirmed.

Merritt, Oswald & Merritt, for appellant.

John W. Hanna, for respondent.

CROW, C. J.—In 1909, Grant county was organized from a portion of Douglas county, by act of the legislature, Laws 1909, ch. 17, p. 19 (Rem. & Bal. Code, § 3780). Section 1 of the act fixed the boundaries of the new county. Section 2 reads as follows:

“The county of Grant shall assume and pay to the county of Douglas its proportion of the bonded and warrant indebtedness of Douglas county, in the proportions that the assessed valuation of that part of Grant county, lying within the present boundary of Douglas county, bears to the assessed valuation of the whole of Douglas county. The adjustment of said indebtedness shall be based on the assessment for the year 1908: . . .”

The act contains no provision relative to the apportionment or division of any property, taxes, funds, or assets of Douglas county existing at the date of division. After the organization of Grant county had been perfected, its auditor and the auditor of Douglas county, assuming to act under the authority of §§ 3826 and 3827, Rem. & Bal. Code, made a written agreement, compromise and settlement, wherein they scheduled the property, funds, real estate taxes, assets, and indebtedness of Douglas county, and as a net result finally determined that, under the sections mentioned and the act of 1909, Douglas county was indebted to Grant county in the total sum of \$52,000, and that warrants upon certain funds of Douglas county should be issued to Grant county in payment thereof. Thereupon this action was commenced by Douglas county, against its auditor and against Grant county, to have the written agreement de-

clared void, and to enjoin the issuance of the warrants. Findings were made upon the pleadings and a final decree was entered enjoining the issuance of the warrants, and declaring the agreement to be null and void. Grant county has appealed.

The trial court found:

"That at the time the said act of the legislature creating said Grant county went into effect and became operative to wit, February 24, 1909, the said Douglas county had a bonded general indebtedness outstanding against it in the principal sum of \$25,000, together with accrued interest thereon. . . .

"That by virtue of the provisions of the legislative act creating the county of Grant said Grant county was to pay to the county of Douglas a percentum of the indebtedness of said Douglas county, based upon the percentum of the assessed valuation of the taxable property of said Douglas county as shown by the assessed valuation of that part of Grant county lying within the boundaries of Douglas county, provided, that such indebtedness was not incurred in the purchase of any county property or in the purchase of any county building falling within or being retained by the other county; that 61.5% is the proportion of assessed valuation for the year 1908 of taxable property of the county of Douglas, which lies within the new county of Grant; that at the time of the creation of said Grant county to wit: on the 24th day of February, 1909, Douglas county was and is now the sole owner and in possession of property, moneys and assets as follows, to wit:

1 court house, jail and grounds of the value of . . .	\$35,000.00
Furniture and fixtures in the various county offices of said court house of the total value of	5,552.05
125 cords of wood of value of	937.50

Money on hand as follows:

Cash in current expense fund	27,403.88
Cash in road and bridge fund	1,704.39
Cash in game protection fund	1,093.05
Cash in soldier's relief fund	208.35
Cash in building fund	807.47
Uncollected bond redemption fund	8,386.65
Uncollected building fund tax	763.61

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Uncollected taxes on real estate tax roll as follows:

Current expense fund	41,606.86
General road and bridge fund.....	9,698.77

Uncollected taxes on personal tax roll of said county as follows:

Current expense fund.....	2,258.82
General road and bridge fund.....	562.67

All of said described property, money and assets being in said Douglas county.

“That on the 26th day of April, A. D. 1909, defendant, T. Claud Bennett, then auditor of Douglas county, Washington, and J. H. Hill, then auditor of Grant county, Washington, made and entered into an agreement by the terms of which said agreement Douglas county was to pay to said Grant county certain sums of money as specified and set out in said agreement, a copy of which is attached to plaintiff’s amended complaint, and made Exhibit I, thereof; that the said action of the said T. Claud Bennett and J. H. Hill in entering into said agreement and in awarding the payment by said Douglas county to said Grant county of any sum of money or thing of value whatsoever, or the transfer from said Douglas county to said Grant county of any part of the property, moneys or assets belonging to said Douglas county at the time of the creation of said Grant county was null and void, wholly without authority of law and in violation of the rights of said Douglas county; that the said county of Grant had no right, title, interest or lawful claim in or to the whole or any part or of any item of the property, money and assets belonging to said Douglas county at the time of the creation of said Grant county, and that said Douglas county is not indebted to said Grant county in any sum of money or thing of value whatsoever.

“That the said T. Claud Bennett, auditor of Douglas county and the said J. H. Hill, auditor of Grant county, acted without warrant or authority, in law in the purported settlement of the portion of the bonded indebtedness which Grant county was to assume and pay to Douglas county as fixed by section 2 of the act creating Grant county, and that such purported settlement is null and void.

“That there has been no valid and legal settlement of the indebtedness between said Douglas and Grant counties; that

there is no provision in the constitution or laws of the state of Washington providing for the distribution of assets between an old and new county in the event of the creation of the new county out of territory embraced wholly within the boundaries of the old county, and no provision in the constitution or statutes of the state of Washington prescribing or fixing a basis for such distribution; that the basis provided in the act creating Grant county for the ascertainment and division of the indebtedness was wholly disregarded by the auditors of the respective counties, Douglas and Grant, in the settlement entered into with reference thereto."

These findings are sustained by the admitted allegations of the pleadings, and appellant has taken exceptions to only such portions of them as might be termed conclusions of law. The question now presented is whether the findings sustain the final decree. Section 3826, Rem. & Bal. Code, provides that, "the new county shall be liable for a reasonable proportion of the debts of the county from which it is taken, and entitled to its proportion of the property of the county." Section 3827 provides that:

"The auditor of the old county shall give the auditor of the new county reasonable notice to meet him on a certain day at the county seat of the old county, or at some other convenient place, to settle upon and fix the amount which the new county shall pay. In doing so, they shall not charge either county with any share of debts arising from the erection of public buildings, or out of the construction of roads or bridges which shall be and remain, after the division, within the limits of the other county, and of the other debts they shall apportion to each county such a share of the indebtedness as may be just and equitable, taking into consideration the population of such portion of territory so forming a part of the said counties while so united, and also the relative advantages derived from the old county organization."

It will be observed that this section makes no provision for an apportionment of existing property. Calling attention to these sections, appellant contends that, in so far as this case is concerned, they are so amended by section 2 of the

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creative act of 1909, that by reading them and the creative act together, they provide that Grant county shall pay its share of the indebtedness of Douglas county in proportion to the assessed valuation of 1908, and shall also be entitled to a like proportion of the property of Douglas county; that the legislature, by the general statutes above cited, has delegated to the auditors power to fix the reasonable proportion of the indebtedness upon which to base an enforcement of § 3 of art. 11 of the state constitution, which provides that:

“Every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken;”

that the general law thus authorizing the auditors to fix such reasonable proportion in so far as Grant county is concerned, has been so limited by section 2 of the creative act that, in any settlement here made, the assessed valuation basis should prevail; that the settlement should be in proportion thereto; that Grant county should pay 61.5 per cent of the indebtedness, and at the same time should receive a like percentage of the property; and that as the settlement of the auditors was made upon that theory, it awards Grant county no more than the law requires.

The special act of 1909, which is of later date than the sections of Rem. & Bal. Code above mentioned, compels Grant county to assume and pay its proportion of all existing bonded and warrant indebtedness of Douglas county, and provides that the proportional assessed valuations of 1908 shall be adopted as the fixed basis for the apportionment of such indebtedness. It will be noted that the act fully meets the requirements of § 3, art. 11 of the constitution, although it does not provide that Grant county shall receive any part of the property. The well established rule of law, in the absence of any statute or any constitutional provision to the contrary, is that, when a new county is created from the

territory of an existing county, the old county will retain all assets previously owned by it, and will be subject to the burden of assuming all of its existing indebtedness. In other words, the new county will be entitled to none of the assets, nor will it be obliged to assume any of the existing indebtedness of the old county. 1 Cooley on Taxation (3d ed.), p. 414; *Laramie County v. Albany County*, 92 U. S. 307; *Tulare County v. Kings County*, 117 Cal. 195, 49 Pac. 8; *City of Wellington v. Wellington Township*, 46 Kan. 213, 26 Pac. 415; *City of Winona v. School District No. 82*, 40 Minn. 13, 41 N. W. 539, 12 Am. St. 687, 3 L. R. A. 46; *Washington County v. Weld County*, 12 Colo. 152, 20 Pac. 273.

In the year 1887, the Colorado legislature passed two acts creating the new counties of Washington and Logan, by carving territory from the existing county of Weld. These acts provided that the "present indebtedness" of Weld county should be apportioned between the new counties in proportion to the ratio of the taxable property at the time of division. Weld county had no indebtedness, but did have in its treasury a surplus of \$60,000. Each of the new counties demanded its share of this surplus, in proportion to, and upon the basis of its taxable property, as specified in the act in relation to indebtedness, and brought suit to recover the same. The Colorado constitution required that each new county upon its establishment should be responsible for a "ratable proportion" of the then existing liabilities of the county or counties from which such new county should be formed; but, like unto the constitution of this state, was silent as to the distribution or division of assets belonging to the old county. In *Washington County v. Weld County*, *supra*, the supreme court of Colorado, stating these facts, held:

"In the absence of restrictive constitutional or statutory provision on the subject, when a new county is created by segregating a portion of the territory belonging to an existing county, the old county retains all assets previously owned

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by it, including rights of action, funds, and other personal property; also all real estate held in proprietary right, save such, if any, as may be within the territory taken away; it likewise remains bound by its existing contracts, and is subjected to the burden of discharging all existing obligations and liabilities. The new county receives none of the assets, and assumes none of the burdens. *Cooley Tax'n*, 176, note 2; *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Mount Pleasant v. Beckwith*, 100 U. S. 514. The reasons for the foregoing doctrine are that the title to all property and ownership of all assets are vested in the old county as a corporate entity, this entity being in no way disturbed by the division of its territory and separation from it of a portion thereof; while on the other hand, all existing obligations and liabilities were incurred in its corporate capacity and name. Therefore, while the legislature has power to divest title, and apportion property as well as indebtedness, yet, if such power be not exercised, there does not follow, as a legal sequence, either a transfer of the assets or liabilities to the new county."

Having called attention to the fact that, although the Colorado acts then under consideration provided for an enforcement of the constitutional mandate relative to indebtedness, they did not contain any provision relative to a distribution of surplus funds or property, the Colorado court further observed:

"But, in the *first* place, it will be noticed that there are no words that can be regarded as expressly granting to the new counties a right to share in the moneys on hand; *secondly*, that no basis for such apportionment is specifically named; yet, in the absence of provision in the premises, it may be doubtful if the intent to distribute the funds, admitting that such intent is shown, could be carried out. Because the legislature adopted a certain basis for the distribution of indebtedness, it does not necessarily follow that this body intended to apply the same method to the apportionment of surplus funds."

The act creating Grant county, while complying with our constitutional mandate relative to existing indebtedness, makes no provision for an apportionment of property. Grant

county, therefore, was not entitled to receive the warrants which the auditor of Douglas county was about to issue in pursuance of the written agreement. That the division of counties and the distribution of property and assets is solely a legislative function, and that legislation to provide for such apportionment is necessary, see 11 Cyc. 357 and cases there cited. In *Laramie County v. Albany County*, *supra*, the supreme court of the United States, discussing the question here involved, said:

“Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim. *North Hemstead v. Hemstead*, 2 Wend. 134; Dil. on Mun. Corp. sect. 128; *Wade v. Richmond*, 18 Gratt. 583; *Higginbotham v. Com.*, 25 id. 633.”

The special act of 1909, creating Grant county, being a complete act in itself of a later date than the sections of Rem. & Bal. Code upon which the appellant relies, is the act under which Grant county was organized and the one to which we must look for the rule to be adopted in the matter of an adjustment of its property, and financial and business relations with the old county of Douglas. As the act creating Grant county has provided a particular basis or rule for an apportionment of existing indebtedness, but has made no provision for an apportionment of existing property, we are constrained to hold that the settlement which the auditors assumed to make is void and cannot be sustained.

The judgment is affirmed.

PARKER, FULLERTON, CHADWICK, and GOSE, JJ., concur.

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[No. 10728. Department One. March 3, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. HERBERT L.
HANLON, *Appellant*.¹

BURGLARY—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction of burglary, notwithstanding a confession of the accused's younger brother that he alone was the guilty party, where it appears that the accused occupied adjoining rooms and had the opportunity, the stolen goods were found in apartments occupied by himself and brother, he made no denial of guilt at the time of his arrest, and had knowledge of the presence of the stolen goods for about a week before his arrest, and made no disclosure thereof.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 30, 1912, upon a trial and conviction of burglary. Affirmed.

Will H. Thompson, for appellant.

John F. Murphy, Hugh M. Caldwell, and H. B. Butler, for respondent.

PARKER, J.—The defendant was convicted of the crime of grand larceny, in the superior court for King county, and sentenced to imprisonment in the state reformatory; from which conviction and sentence he has appealed to this court.

The only contention here made by appellant's counsel is that the evidence was not sufficient to justify the verdict of the jury. This question was first raised in the trial court by motion for a new trial, there being no motion for nonsuit or directed verdict upon the trial. The evidence introduced upon the trial was, in many particulars, in serious conflict. However, a painstaking reading of the entire record convinces us that there was competent evidence produced before the jury warranting them in believing the following facts to be established.

¹Reported in 130 Pac. 339.

It is conceded that the goods in question were stolen by some person or persons on or about Sunday, January 28, 1912, from a room in a Seattle business block occupied by the owners of the goods, Mr. and Mrs. Douglas. The goods stolen were furs and some small articles belonging to Mrs. Douglas, and a dress suit, two white vests, and an overcoat of Mr. Douglas. At that time and for some time previous thereto, appellant had been engaged in newspaper work, and by permission of a tenant of an adjoining room, used his room occasionally during evenings and on Sundays. Appellant did typewriting and mimeograph work there at those times, in making out his reports to the various newspapers to which he was furnishing material for publication. He did not have a key of his own to the room, but would get the key from time to time from the tenant occupying it, as occasion might require. He procured the key and occupied the room on Saturday and Sunday afternoon and evenings of the 27th and 28th of January, and also probably occupied it Monday evening, the 29th, though this is not entirely clear from the evidence. He was, however, seen to leave the building on that evening. There is a door leading from this room into the adjoining room occupied by Mr. and Mrs. Douglas. In what manner this door was locked or fastened, does not appear; but in any event, there was nothing in common between the people occupying the different rooms, and neither had any occasion to pass through this door, each room having access to the hall of the building through an outer door of its own.

Mr. and Mrs. Douglas discovered the theft on the following Wednesday, January 31. They had been absent from their room since Friday evening, January 26. During this time and for some time thereafter, appellant, his mother, and a younger brother named Howard made their home in an apartment house in the city, their apartment being leased in the name of appellant, who was practically the head of the family. He is 26 years old, and his brother Howard is 17 years old. On February 21, most of the goods were found by

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an officer while executing a search warrant in the apartment occupied by appellant, his mother, and brother. The larger part of the goods were found in a closet of the apartment. Some of the smaller things were found in a bureau in the room occupied by Mrs. Hanlon. A pair of shoes and an art bag were produced by appellant from the room occupied by Howard. The two white vests were also produced by appellant. It is not clear from just where he got them. They had previously been sent away and returned with the family laundry. A silver purse was taken from Mrs. Hanlon, or rather given to the officer by her upon demand after she had removed some cards and car tickets therefrom which she claimed belonged to her. All of these articles, save the cards and car tickets, belonged to Mr. and Mrs. Douglas.

While the officer was there, and in the presence of other witnesses, Mrs. Hanlon said to appellant in substance: "Herbert, why did you do it?" evidently referring to the taking of the goods; to which he replied in substance: "Never mind, mother." Appellant, his brother, and mother all knew of the presence of the stolen goods in their apartment for about a week previous to this time, and no report of the fact had been made to the police. Their version of the manner of the goods coming there we will notice later. Appellant was then arrested and taken to police headquarters with the goods. On the way he asked a brother of Mr. Douglas, who had been present at the apartment and was going along with them, if all of the stuff had been found, and asked what was missing. He was informed that a fraternity pin, a gold chain and a scarf pin were missing. He asked about how much they would be worth, and was informed about \$75. He then replied to Mr. Douglas: "I will have to make that up, won't I?" He then asked Mr. Douglas if he (Douglas) would speak to his brother and have it kept quiet and suggested that it could be fixed up.

Mrs. Hanlon testified, in substance, that she had told Mr. Douglas, when the search was being made and appellant was

being arrested, that they were taking the wrong man, and appellant also testified that he heard her make this statement. He also testified that he denied to Mr. Douglas that he had stolen the goods. All of this is flatly contradicted by Mr. Douglas and other witnesses present. Appellant also testified, in substance, that he gave the officers at the police headquarters to understand that his mother could tell them who was the person who stole the goods. This is also denied by the state's witnesses.

We think the jury were warranted in believing that appellant made no denial of his stealing of the goods at that time, nor at any time until after Howard's alleged confession, which was made upon the following day, to the prosecuting attorney, that he (Howard) had stolen the goods. On that day, February 22, appellant being still under arrest and detained at police headquarters, Mrs. Hanlon took Howard to Mr. Murphy, the prosecuting attorney, where Howard confessed that he had entered the room of Mr. and Mrs. Douglas, and stolen the goods, and taken them to their apartment. Howard testified in substance, that he was helping his brother at the room adjoining that of Mr. and Mrs. Douglas on Sunday afternoon, the 28th of January, doing some mimeograph work; that his brother went away from the room about an hour before he did, and that soon thereafter he noticed that the door leading into the adjoining room of Mr. and Mrs. Douglas was ajar several inches; that he then pushed the door back and went into the room and took the goods away; that his brother, appellant, had nothing to do with it, and knew nothing of it, until about a week before they were discovered by the officer with the search warrant. According to the testimony of appellant and Mrs. Hanlon, the goods were discovered by them in a closet of Howard's room about February 17; they then attempted to get Howard to explain where the goods came from, but he refused to do so until after appellant was arrested when Howard made the statement to the prosecuting attorney. The only

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testimony offered in behalf of appellant was that of himself, his mother, and brother, and while their testimony is fairly consistent as between themselves, there is sharp conflict between their testimony and the state's witnesses upon a great many of the details brought out, especially as to the acts and statements of those present, including appellant, his mother, and brother, at the time the search was being made.

Counsel for appellant places great reliance upon the confession of Howard made to the prosecuting attorney, insisting that reasonable minds cannot differ as to the truth of that confession. We may accept as true that confession in so far as it implicates Howard in the taking of the goods, but it does not follow that the jury were not warranted in believing that appellant was guilty. The guilt of Howard is not at all inconsistent with the guilt of the appellant.

In view of the fact that the goods were stolen by some person or persons from the room of Mr. and Mrs. Douglas on or about January 28; the opportunity of appellant to take the goods at the time the theft was committed; the knowledge of appellant of the presence of the stolen goods in the apartment occupied by himself, mother, and brother, for about one week before they were discovered by the officer and no report having been made of that fact; the finding of the goods in the apartment, some of them at least under circumstances which would warrant the jury in believing they were in the possession of appellant; the acts and statements of appellant at the time of and immediately following the search of the apartment; together with all the circumstances shown; we do not feel warranted in disturbing the verdict of the jury finding appellant guilty. The record discloses that appellant had a fair trial with instructions to the jury quite favorable to him.

The judgment is affirmed.

CROW, C. J., CHADWICK, and MOUNT, JJ., concur.

[No. 10849. Department Two. March 3, 1913.]

PAUL FRIEDMAN, *Respondent*, v. A. W. BRANNER, *Defendant*,
PATRICK E. SULLIVAN, *Garnishee, Appellant*.¹

FRAUDULENT CONVEYANCES—SALES IN BULK—AFFIDAVIT AS TO CREDITORS—LIABILITY OF PURCHASER—GARNISHMENT—PERSONAL LIABILITY OF GARNISHEE. When a purchaser of a stock of goods in bulk fails to take an affidavit as to the creditors, which by Rem. & Bal. Code, § 5296, is made a prerequisite of the validity of sales in bulk, he becomes a trustee, and if he disposes of part of the goods, he becomes personally liable to the creditors of the vendor, without first pursuing the property, and without showing that he, as a garnishee defendant, has sufficient of the property of the debtor remaining under his control to satisfy the judgment.

Appeal by a garnishee from a judgment of the superior court for King county, Main, J., entered July 2, 1912, upon findings in favor of the plaintiff, in actions on contracts. Affirmed.

Richard Saxe Jones, for appellant.

Morris B. Sachs, for respondent.

MORRIS, J.—This appeal involves the construction of the sales in bulk law, and the proper judgment to be entered against garnishee defendants, who purchased the goods and business in bulk from the original debtor without taking the required affidavit. The material facts presenting these questions are about these: Defendant purchased a saloon business from one G. W. Crowe, borrowing \$2,000 from respondent to pay upon the purchase price, and giving Crowe notes for the balance. Branner proceeded to do business at the location, and under the license purchased from Crowe, until the expiration of the license. He then obtained a new location and a new license, moving the fixtures and such merchandise as was not disposed of from the old to the new location. Branner carried on his saloon business in his new

¹Reported in 130 Pac. 360.

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location from April until the following October, when he sold the business, license, and good will to Sullivan, receiving the full purchase price in cash. At this time Branner was indebted to Crowe upon the purchase from him, and to respondent upon the loan obtained at the time of the Crowe purchase. Shortly thereafter Branner disappeared, leaving no trace of his whereabouts. Sullivan, at the time of his purchase, was informed by Branner that there were no debts against the saloon. In order to satisfy himself of this fact he examined the records in the county auditor's office, and found no record evidence of any indebtedness. It was suggested to Sullivan by the attorney who drew the bill of sale from Branner to Sullivan, that the statutory affidavit be taken, but Sullivan, having known Branner for some time, and being satisfied with the statement that there were no debts, waived this protection and the transfer was completed. After the disappearance of Branner, actions were commenced by Crowe and respondent to recover the balance due upon their respective claims, serving Branner by publication and obtaining a writ of garnishment against Sullivan. In due course a personal judgment was entered against Sullivan for the respective amounts due Crowe and Branner, and Sullivan has appealed. This appeal involves only the respondent's judgment, it having been stipulated that the Crowe judgment shall abide the event.

Appellant submits these questions: Can a personal judgment be entered against the garnishee, under the circumstances here present, without first pursuing the property, and without showing that the garnishee has sufficient property of the defendant under his control or in his possession to satisfy the judgment? The statute and its interpretation as found in our previous holdings answers each of these questions in the affirmative. The statute is found in Rem. & Bal. Code, § 5296 *et seq.* It provides that, in cases of all transfers of merchandise in bulk, or whenever substantially the entire business or an interest therein is disposed of, an

affidavit shall be required, showing the names of all creditors, with the indebtedness due or to become due, and that when such affidavit is not taken, or the purchaser shall not see to it that the purchase price is applied to the payment of the claims of creditors of the vendors, such sale or transfer "shall be fraudulent and void." There can be no question but that under these provisions the sale to Sullivan was void as against the creditors of Branner. The sale being void, the property was the property of Branner in contemplation of law; or, if it or any part of it had been disposed of, the money obtained from its sale was the money of Branner. It is immaterial to what extent the original property obtained from Branner remained in the possession of Sullivan at the time of the garnishment. Under this statute, Sullivan had either the property itself or its purchase price. It was immaterial which; either was the property of Branner and subjected Sullivan to garnishment as having money or property of Branner in his possession or under his control.

In *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003, and *Kohn v. Fishbach*, 36 Wash. 69, 78 Pac. 199, 104 Am. St. 941, we held that, when the statutory affidavit was not taken, the goods attempted to be disposed of by the sale remained the goods of the vendor, and as such in the hands of the vendee were to be regarded as a trust fund, and the vendee the trustee for the benefit of the creditors of the vendor. As in legal contemplation the sale to Sullivan was fraudulent, the possession resulting from the sale was wrongful. Sullivan's position is in law no better than that of a purchaser of property for the purpose of defeating the just claims of his vendor's creditors. He can retain neither the property, nor, in case of its sale, the money obtained therefrom. *Millar & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956; *Cowles v. Coe*, 21 Conn. 220. And, since he was wrongfully in possession of the property or its equivalent, Sullivan stands as does any other person who has wrongfully converted property to his use. He cannot say the remedy of those entitled to the prop-

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erty is against the property itself only; but must respond in damages for its conversion. It is, we think, well established that, when a trustee such as Sullivan was in legal contemplation, in violation of his trust disposes of the trust property, he is personally liable. 39 Cyc. 533; *Miller v. Butler*, 121 Ga. 758, 49 S. E. 754; *English v. McIntyre*, 29 App. Div. 439, 51 N. Y. Supp. 697; *McArthur v. Gordon*, 126 N. Y. 597, 27 N. E. 1033, 12 L. R. A. 667; *Ferguson v. Hillman*, 55 Wis. 181, 12 N. W. 389; *Citizens State Bank v. Council Bluffs Fuel Co.*, 89 Iowa 618, 57 N. W. 444.

It follows that the judgment must be affirmed.

CROW, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 10886. Department Two. March 3, 1913.]

JACKSON ESTATE, *Respondent*, v. HENDRICK SUYDAM *et al.*,
Appellants.¹

INDEMNITY—BONDS—ACTIONS—LIABILITY—LIQUIDATED DAMAGES OR PENALTY. Where a landlord, who was secured by bond, was damaged in an amount exceeding the sum secured by the bond, by reason of the lessee's default, he is entitled to judgment in an action on the bond, whether for liquidated damages as specified in the bond, or by way of penalty.

Appeal from a judgment of the superior court for King county, Main, J., entered July 5, 1912, upon findings in favor of the plaintiff, in an action on a bond of indemnity. Affirmed.

Reed & Hardman, for appellants.

Robert F. Booth, for respondent.

MORRIS, J.—On May 11, 1910, respondent leased to appellant Suydam an apartment house in Seattle, known as the Belgravia, for a term of five years, at a monthly rent of \$1,250. On the same day, Suydam and the other appellants

¹Reported in 130 Pac. 360.

executed and delivered to respondent a bond, conditioned for the faithful performance of the lease, and providing: "In the event the said Hendrick Suydam shall fail to faithfully carry out all the terms of said lease, the said lessor may collect the full sum of six thousand two hundred and fifty (\$6,250) dollars herein agreed to be paid, said sum being hereby agreed upon as liquidated damages." Subsequently default having been made in the terms of the lease, respondent brought this action upon the bond, alleging damages in the sum of \$10,000, and demanding judgment against appellants for the sum nominated in the bond. From the judgment so entered, this appeal is taken.

The only question presented on the appeal is whether the \$6,250 shall be held to be liquidated damages, as stated in the bond, or as a penalty. It does not seem to us it is necessary to determine that question, or that, in the light of the findings, such a determination is decisive of this appeal. The court below found that respondent had been damaged, by reason of the failure of Suydam or his assignee to carry out the terms of the lease, in excess of \$7,000, because of a depreciation in the rental value of the premises. This being found and the finding being sustained by the evidence, respondent was plainly entitled to a judgment against appellants in the sum of \$6,250, whether that sum be held as a penalty or liquidated damages. *Georgia Land & Cotton Co. v. Flint*, 35 Ga. 226. We decline, therefore, to discuss the legal phase of the matter as between liquidated damages and a penalty, inasmuch as under either holding respondent is entitled to judgment under the findings.

Judgment affirmed.

Crow, C. J., Mount, Ellis, and Fullerton, JJ., concur.

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[No. 10966. *En Banc*. March 3, 1913.]

PATRICK H. DOLAN *et al.*, *Appellants*, v. PUGET SOUND
TRACTION, LIGHT & POWER COMPANY, *Respondent*,
THE CITY OF SEATTLE, *Appellant*.¹

STREET RAILROADS—FRANCHISES—ORDINANCES. A street railway franchise ordinance to extend lines for two blocks, expressly declaring that nothing therein contained shall affect any franchise previously granted or authorize the city to acquire any property in the public streets heretofore constructed or located under any franchise previously granted, conflicts with a provision in a city charter providing that when any franchise is granted, the grantee shall voluntarily agree that "all the property of the grantee within the limits of the public streets" may be taken by the city at a fair valuation.

STREET RAILWAYS—ORDINANCE—FRANCHISE—VALIDITY—CONFLICT WITH STATE LAW. The city charter of Seattle, art. 4, § 20, making an ordinance granting a street railway franchise subject to a referendum vote of the people, and requiring any extension, or new franchise covering any substantial part of an old one, to be first submitted to a vote of the qualified electors, is void; since the legislature by Rem. & Bal. Code, § 9080, has vested in the legislative authority of the city the power to grant street railway franchises without the restrictions imposed by the charter.

MUNICIPAL CORPORATIONS—CHARTERS—POWERS—STATUTES—IMPLIED REPEAL—STREET RAILWAYS—FRANCHISES. Laws 1911, p. 54, §§ 1-3, providing that the form of the organization and the manner and mode in which cities of the first class shall exercise powers "with respect to their own government" shall be as provided in their charters, and authorizing direct legislation "within the scope of such powers" by the initiative and referendum, does not impliedly repeal Rem. & Bal. Code, § 9080, conferring upon the mayor and council the power to grant franchises; since the power to grant franchises is a sovereign power which may be delegated by the state and is not within the act of 1911 relating to powers exercised by cities, "with respect to their own government."

Appeal from a judgment of the superior court for King county, Dykeman, J., entered December 4, 1912, dismissing an action for an injunction, on sustaining demurrers to the complaints. Affirmed.

¹Reported in 130 Pac. 353.

Raymond D. Ogden and Edwin S. Douglas, for appellants Dolan.

James E. Bradford, for appellant city of Seattle.

James B. Howe and Hugh A. Tait, for respondent.

MOUNT, J.—The trial court sustained defendant's demurrers to the complaint of the plaintiff, and to the complaint in intervention filed by the city of Seattle. The plaintiffs and the city both elected to stand upon the allegations of their complaints, and the action was dismissed. This appeal followed.

The facts are substantially as follows: On November 18, 1912, the city council of Seattle passed an ordinance granting a franchise to the respondent to extend its street car lines a distance of two blocks upon one of the public streets of the city. This ordinance, which was duly passed and approved by the mayor, contained the following provisions:

"It is expressly stipulated and agreed by the city of Seattle and its successors that nothing in this franchise contained shall in any manner affect any franchise previously granted by the city of Seattle or by the county of King or by any other municipal corporation, nor shall anything herein contained authorize the city of Seattle or its successors to acquire any property in the public streets of the city heretofore constructed or located under any franchise previously granted, nor shall any franchise or any property constructed or located thereunder be considered altered, amended, repealed, or in any manner modified by this ordinance."

The city charter, art. 4, § 20, provides as follows:

"Every grant of a franchise, right or privilege shall be subject to the right of the city council, or the people of the city acting for themselves by the initiative and referendum, at any time subsequent to the grant, to repeal, amend or modify the said grant with due regard to the rights of the grantee and the interest of the public; and to cancel, forfeit and abrogate any such grant if the franchise granted thereby is not operated in full accordance with its provisions, or at all; and at any time during the grant to acquire, by pur-

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chase, or condemnation, for the use of the city itself, all the property of the grantee within the limits of the public streets, at a fair and just value, which shall not include any valuation of the franchise itself, which shall thereupon terminate; and every ordinance making any such grant shall contain a reservation of these rights of the city council, and of the people of the city acting for themselves by the initiative and referendum, to so repeal, amend or modify said ordinance and to so cancel, forfeit and abrogate the grant, and to so acquire the property of the grantee in the public streets, as hereinbefore set forth. The city council shall not consider or grant any application for extension of the period of any franchise, nor any new franchise covering all or any substantial part of the rights or privileges of any existing franchise, until within three years of the expiration of the existing grant, and then only after submission to and approval by majority vote of the qualified electors."

After the ordinance above referred to was passed, and all the preliminary steps taken by the city authorities and the respondent to carry out the terms of the ordinance, this action was brought to restrain the respondent from accepting the franchise provided for by the ordinance, upon the ground and for the reason that the ordinance is void. The appellants Dolan and wife contend that the ordinance is void because it is in conflict with § 20, art. 4, of the city charter as above quoted. The city contends that the ordinance is valid because it does not conflict with the city charter. The respondent contends that the charter provision is void, and the ordinance is therefore valid. The trial court, in passing upon the demurrers, was of the opinion that § 20, art. 4, of the city charter, was void, and that the ordinance passed by the city council and approved by the mayor was a valid exercise of legislative authority. The real question in the case, therefore, is whether the ordinance is valid.

There can be no doubt that the ordinance is in conflict with § 20 of the city charter above quoted, because this provision of the charter is to the effect that every franchise granted shall be subject to the right of the city council or the people

to acquire "all the property of the grantee within the limits of the public streets," which shall not include any valuation for the franchise itself; "and every ordinance making any such grant shall contain a reservation of these rights of the city council and of the people." The ordinance in question does not reserve these rights, but expressly declares "that nothing in this franchise contained shall in any manner affect any franchise previously granted by the city of Seattle or by the county of King or by any other municipal corporation, nor shall anything herein contained authorize the city of Seattle or its successors to acquire any property in the public streets of the city heretofore constructed or located under any franchise previously granted." It seems plain that this provision of the ordinance is in the face of the charter, because the apparent purpose of the charter provision is that, when a franchise is granted and accepted, the grantee thereby voluntarily agrees that "all the property of the grantee within the limits of the public streets" may be taken at a fair and just value, which shall not include any valuation of the franchise itself. The provision is not "all the property of the grantee within the limits of the franchise granted," as counsel for the city seem to contend, but "all the property of the grantee within the limits of the public streets." We think there is no escape from the conclusion that the ordinance is in conflict with the city charter.

The question then arises whether this provision of the city charter is valid. In *Benton v. Seattle Elec. Co.*, 50 Wash. 156, 96 Pac. 1033, in considering this same charter provision, we held it was void because it was in conflict with the Laws of 1903, page 364, as amended by Laws of 1907, page 192 (Rem. & Bal. Code, § 9080), which vests in the legislative authority of the city the power to grant franchises, and because the legislative authority of the city means the *mayor* and *city council*. In *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259, we again held that the state law authorizing the mayor and the city council of cities to grant franchises to

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street railways is conclusive, and controls charters of cities of the first class. In that case, we said, at page 240:

“If that charter amendment did not legally require the legislative authority of the city to embody the conditions therein specified, in the franchise, and did not legally require the submission of the franchise to a vote of the people of the city, because of the broad powers given by the state legislature in these laws, then, upon the same principle, the legislative authority of the city was not legally required to invite bids for the franchise, nor legally required to grant the same to the highest bidder. If the charter provision does not limit or control the exercise of the power granted by the state law in the one instance, it is manifest it does not do so in the other. It having become the settled law of this state, by the construction repeatedly placed upon the constitution, that a general law enacted by the legislature is superior to and supersedes all freehold charter provisions inconsistent therewith, it becomes plain that, when the legislature, by the Laws of 1903 and 1907, gave to the legislative authority of the cities of the state the power to grant street railway franchises, and also the power to ‘*prescribe the terms and conditions on which such railways . . . shall be constructed, maintained and operated,*’ that power cannot be limited or prescribed by freehold charter provisions. The legislative power given by these laws to the mayor and council, to grant such franchise, includes the power to name the grantee, which power, under such laws, is as purely legislative as any other part of the power conferred. To hold that a freehold charter provision may so limit this power as to reduce the exercise of it to a mere ministerial or at most a judicial act, thus rendering it reviewable by the courts, would be to take from the mayor and council a portion of the legislative power directly conferred upon them by a general law of this state.”

It is argued by counsel for the city that the act of 1911, Laws 1911, page 54, relating to the form of organization and exercise of powers of cities of the first class, repeals the act of 1903, as amended by the act of 1907 [Rem. & Bal. Code, § 9080] relating to the electric street railways, and validates § 20 of art. 4, of the Seattle charter, which this court had theretofore held invalid. But we are satisfied that the act of

1911, referred to in the briefs as the Gandy act, was not so intended, and does not repeal the act of 1903, as amended in 1907, relating to electric railways. The act of 1911 is as follows:

"Section 1. The form of the organization and the manner and mode in which cities of the first class shall exercise the powers, functions and duties which are or may be given by law to such cities, with respect to their own government shall be as provided in the charters thereof.

"Sec. 2. Any such city may provide in its charter for the recall of election officers and for direct legislation by the people upon any matter within the scope of such powers, functions or duties of any such city by the initiative and referendum.

"Sec. 3. This act shall apply to any charter of any such city heretofore adopted or approved by the electors at an election duly held."

It is clear that this act relates to the form of organization and the exercise of powers "*with respect to their own government.*" It authorizes such cities to adopt their own charters, and authorizes direct legislation upon any matter within the scope of "*such powers;*" that is, with respect to their own government. The power to grant franchises is a sovereign power. It may be delegated by the state, but it is not within the powers of cities unless expressly delegated by the state. *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 Pac. 888. When the legislature of the state authorizes cities of the first class to frame their own charters, and says that the powers, duties, and functions shall be as provided therein with respect to their own government, it cannot be reasonably claimed that the right to grant franchises is included therein; (1) because such grants must be direct and clear, and (2) because the grant of franchises is not a part of their "own government," but is a delegated power of the state. We are satisfied, therefore, that the act of 1911 did not revive § 20 of art. 4 of the Seattle charter, and did not repeal by implication or otherwise the act of 1903 as amended in 1907,

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relating to electric railways. That act is in full force and effect in cities of the first class. The ordinance in question passed by the legislative authority is therefore valid.

The judgment is affirmed.

CROW, C. J., PARKER, GOSE, MAIN, and CHADWICK, JJ.,
concur.

[No. 10600. Department Two. March 4, 1913.]

MALCOLM McDOUGALL, *Appellant*, v. W. L. O'CONNELL
et al., *Respondents*.¹

MINES AND MINERALS—SALES—OPTION TO RESCIND—REASONABLE TIME—NOTICE—SUFFICIENCY. A contract to return the purchase price of mining property "at the end of three years," if the purchaser is dissatisfied, allows a reasonable time after the expiration of the three years to give notice of dissatisfaction; and a notice is timely where it was, within two months, mailed to the party's address, where his family resided, two weeks prior to his expected return from the interior of Alaska where he had been for some time.

SAME—OPTION TO RESCIND—CONSTRUCTION. Under an agreement to return the purchase price of mining property, within a limited time if the purchaser "is dissatisfied" with the property, he need not show reasonable grounds for his dissatisfaction.

SAME—OPTION TO RESCIND—CONDITION PRECEDENT. Under an agreement to return the purchase price of mining property, at the end of three years, if the purchaser is dissatisfied, "he keeping up his share of the assessment work," failure to meet the assessment for the last year does not forfeit the purchaser's right to rescind, where no demand was made upon him for the payment of his portion, and assessments for the two previous years had not been met until the work was done and request for payment made; no assessment work having been done the last year (MORRIS, J., dissenting).

Appeal from a judgment of the superior court for King county, Myers, J., entered April 20, 1912, upon findings in favor of the defendants, in an action on contract, after a trial to the court. Reversed.

Benton Embree, for appellant.

F. C. Reagan, for respondents.

¹Reported in 130 Pac. 362; 131 Pac. 204.

MAIN, J.—This is an action to recover money alleged to be due upon a contract. On May 20, 1908, at Seattle, Washington, the defendant W. L. O'Connell executed and delivered to the plaintiff a writing in terms as follows:

"If Mr. McDougall is dissatisfied with the property I have sold him in Camp O'Connell, Elk county, Nevada, at the end of three years, he keeping up his share of the assessment work, I agree to return him the amount he has paid for it, \$2,500, with 10% interest. W. L. O'Connell."

Some time prior to this date, the parties had had certain negotiations, looking to the sale to the plaintiff by W. L. O'Connell of an undivided one-fourth interest in certain mining claims, situated in Elk county, Nevada. On July 28, 1908, the plaintiff, pursuant to the agreement to purchase, paid \$1,000, and on the 4th day of August, 1909, \$1,500. At the time of the latter payment, \$300 was paid for the assessment work for the year 1909. All these sums were paid to W. L. O'Connell. When the last payment on the purchase price was made, deeds were delivered to the plaintiff, conveying the interest purchased in the mining claims, which deeds were executed by John O'Connell, the brother of W. L., in whose name the filings upon the claims had been made. On November 14, 1910, the plaintiff paid his proportion of the assessment work for that year. On May 5, 1911, W. L. O'Connell and one Cameron departed on a trip to the interior of Alaska, expecting not to return until either the month of August or September following. McDougall, the plaintiff, knew of their departure and the time of their expected return. During the time that they were in Alaska, they were at a place where there was no regular mail delivery, but upon two occasions while there mail was brought in by parties coming from the outside.

The trial court found, and there seems to be no real controversy upon this question, that the three-year limitation provided for in the contract expired on May 20, 1911, at 12 o'clock midnight. The following day being Sunday, on

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Monday, May 22, 1911, John O'Connell was requested to come to the office of the attorney for McDougall, and he was there informed that McDougall was dissatisfied with the mining claims and desired the return of his money under the terms of the agreement. On July 22, 1911, the plaintiff, knowing the time when W. L. O'Connell was expected to return from Alaska, caused to be sent to him by registered mail addressed to his Seattle residence a notice of dissatisfaction and demand for the return of the purchase price, together with interest. O'Connell arrived in Seattle on his return from Alaska, August 6, 1911, and on August 22, he appeared at McDougall's office, after having received the notice of dissatisfaction by registered mail. During all of the times above mentioned, W. L. O'Connell's residence was at a place in Seattle known to McDougall, and his family were at the residence during the period of time that O'Connell was in Alaska. As has been stated, the three years mentioned in the contract, at the end of which time McDougall might demand the return of his money, expired on May 20, 1911. McDougall did not pay his proportion of the assessment work for the year 1911, which would have amounted to the sum of \$300. The assessment work upon the claims for this year was not in fact done, and on the first of the following January they were relocated by adverse parties. McDougall's demand for the return of his money was not responded to by O'Connell, and this suit was brought to recover the same. The cause was tried to the court without a jury. At the conclusion of the trial the court found for the defendant, apparently on the ground that McDougall did not within a reasonable time after May 20, 1911, notify W. L. O'Connell of his dissatisfaction; thereupon the plaintiff appealed.

The questions presented upon this appeal are, (1) Was the notice of dissatisfaction communicated to W. L. O'Connell in time? (2) Must the appellant show reasonable grounds for his dissatisfaction? And (3) did the appellant forfeit his

right to declare dissatisfaction by failing to meet his proportion of the assessment work for the year 1911?

The first question presented requires the interpretation of the clause "at the end of three years," as used in the contract. Under this provision the appellant could not have declared his dissatisfaction prior to the expiration of the three years mentioned, for the contract specifies otherwise. Contracts with like or similar language have been frequently construed by courts of last resort to mean that notice of dissatisfaction or demand for the return of money must be made within a reasonable time after the expiration of the time stated. "At the end of three years" in contracts of this character means within a reasonable time thereafter. *Rogers v. Burr*, 97 Ga. 10, 25 S. E. 339; *La Dow v. Bement & Sons*, 119 Mich. 684, 79 N. W. 1048, 45 L. R. A. 479.

In the *Rogers* case, the question is covered by this language:

"This contract, on the faith of which the administrator of Chambers subscribed for sixty shares of stock in the Barnesville Manufacturing Company, stipulates that if, at the expiration of three years from December 1st, 1889, the subscriber desires no longer to carry the stock, the plaintiffs in error will, 'with thirty days' notice,' pay such subscriber par value for the same. This provision gave to the subscriber the right, at the expiration of three years from the time stated, to elect whether he would keep the stock, or turn it over to plaintiffs in error, and require them to pay him therefor its par value. He had no right to make this election before the expiration of the time. The time for such election expired at midnight on November 30th, 1892, and it could not have been made until the full expiration of the time. The position that the election ought to have been made on the last moment of the last day is too absurd to seriously consider. It follows that the time for the exercise of the right was after the expiration of the three years. The word 'at' in this contract is equivalent in meaning to 'after.' It was held in *Annon v. Baker*, 49th N. H. 169, cited in American and English Encyclopædia of Law, vol. 1, first edition, page 893, note, that 'at the end of one year,' means 'at the expira-

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tion of one full and entire year,' and that 'at,' is equivalent in meaning to 'after.' If the word 'after' is substituted for 'at' in the contract under review, there can be no doubt about the correctness of the instruction given to it in the head-note. As the election could be made after the expiration of the time limited, of course a reasonable time was allowable for this purpose."

It follows that appellant must exercise his right under the contract within a reasonable time after May 20, 1911, by giving notice to W. L. O'Connell. What would be a reasonable time depends upon all the attendant facts and circumstances. At the end of the three-year period specified in the contract, W. L. O'Connell was in the interior of Alaska where the deliveries of mail were infrequent and irregular. He was expecting to return within a period of a few months. The notice of dissatisfaction was prepared and sent to his Seattle address more than two weeks prior to the date of his return. The delay caused no prejudice. There is no showing that, had the notice been sent to Alaska, it would there have been received, or that O'Connell was in any worse position than he would have been had the notice been mailed to him immediately after the 20th day of May, 1911. Notice to John O'Connell or to the family of W. L. would be unavailing, for they were not parties to the contract. The facts not being in dispute, what would be a reasonable time becomes a question of law; and when all the surrounding facts and circumstances are considered, we think the trial court erred in holding that the notice of dissatisfaction was not given within a reasonable time.

As to the second question, the rights of the parties must be measured by the terms of the contract. The contract says that, if McDougall is dissatisfied, then the money will be repaid. It does not say that, if he is dissatisfied and has reasonable grounds for his dissatisfaction, then the money will be returned. The law on this question is well stated in 24 Am. & Eng. Ency. Law (2d ed.), p. 1236, as follows:

"The courts have had frequent occasion to interpret contracts for the rendition of services, the sale or manufacture of articles, etc., in which it was agreed that the services should be satisfactory to the employer, or that the article should satisfy the purchaser. And where there is an agreement that an act shall be done in a manner satisfactory to the promisee, it is generally held that he is the sole arbiter of the performance according to the agreement. It is not enough to show that the promisee ought to be satisfied and that his discontent is without reason."

See, also, to the same effect: 9 Cyc. 620; *Tatum v. Geist*, 46 Wash. 226, 89 Pac. 547.

The third question is that of the failure to meet the assessment work for the year 1911. This delinquency is not sufficient to forfeit the right of the appellant to recover. It does not appear that any demand had been made upon him for the payment of his portion of the assessment work for that year. Neither of the assessments for the two previous years had been met until the work was done and request for payment made. As shown by the facts stated, the work for this year had at no time been done. By the terms of the contract, however, the appellant was entitled to the return of the money, "he keeping up his share of the assessment work." Having held the property for a period of three years, he should be required to meet his portion of the assessments for that period of time. The sum of \$300 should be deducted from the total of the purchase price and interest.

The cause will therefore be reversed and remanded, with direction to the superior court to enter a judgment for the appellant for the purchase price paid, together with interest at ten per cent per annum thereon from the dates of payment, less the sum of \$300, the amount of the assessment work which the appellant was required to pay for the third year.

FULLERTON, ELLIS, and MOUNT, JJ., concur.

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Syllabus.

MORRIS, J. (dissenting)—I dissent, upon the ground that keeping up his share of the assessment work was a condition precedent to appellant's right of recovery, and not having done so, his right of action failed.

ON PETITION FOR REHEARING.

[*En Banc.* April 10, 1913.]

PER CURIAM—A petition for rehearing has been filed in this case. In the petition for rehearing, our attention is called to an error in the opinion. There we directed generally that the superior court enter a judgment for the appellant, when the direction should have been to enter a judgment for the appellant and against the respondent W. L. O'Connell only, and not against the community composed of W. L. O'Connell and Evelyn F. O'Connell, his wife. The appellant in his brief conceded that the liability upon the contract was that of the husband only. The original opinion will be modified to the extent here indicated. Otherwise the petition for rehearing is denied.

[No. 10401. Department One. March 4, 1913.]

H. A. BURNHAM, *Respondent*, v. WASHINGTON MACHINERY DEPOT, *Appellant*.¹

WORK AND LABOR—SERVICES — LIEN — CONTRACT OF EMPLOYMENT. The vendee under a conditional sales contract, which required him to take care of the property while in his possession, is not entitled to a lien for services in taking care of the property, after its abandonment by a receiver, where he still claimed under the conditional sales contract, and refused to allow the vendor to take possession; and a letter from the vendor notifying him that the receiver's watchman had been let out and "trusting" that he would take some supervision over the property pending adjustment of the matter, cannot be construed as a contract employing him to care for the property.

¹Reported in 130 Pac. 337.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered January 3, 1912, upon findings in favor of the plaintiff, in an action to foreclose a lien. Reversed.

Huffer, Hayden & Hamilton and Frank C. Owings, for appellant.

Thomas M. Vance, Harry L. Parr, and Troy & Sturdevant, for respondent.

Wilson R. Gay, Geo. Olson, and Milo A. Root, amici curiae.

MOUNT, J.—This action was brought by the plaintiff to foreclose a lien claim of \$2,150 upon a certain lot of sawmill machinery. The lien claim is based upon a *quantum meruit* account for alleged services performed by the plaintiff at the request of the defendant, between September 3, 1909, and November 18, 1910, as watchman and caretaker of the machinery. Upon the trial of the case, a judgment and decree of foreclosure in the sum of \$1,320.40 was entered in favor of the plaintiff. The defendant has appealed.

The substantial facts are that the mill machinery was delivered by the defendant to the plaintiff in May, 1906, and October, 1907, under two contracts of conditional sale. These contracts provided that the title to the property should remain in the defendant until paid for by the plaintiff. The plaintiff did not pay for the property but remained in possession, using it until July 30, 1909. On that day involuntary proceedings in bankruptcy were instituted in the United States district court for the Western District of Washington, against the plaintiff, by certain creditors. A receiver was appointed, who took immediate possession of the property and placed a watchman in charge. At that time the receiver had no funds available to pay the watchman. The defendant and other creditors advanced money to pay for a watchman for one month. At the end of that month, namely, August, 1909, the defendant refused to advance more money

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to the receiver, who threatened to discharge the watchman. Three days later, on September 3, 1909, the defendant wrote to the plaintiff a letter as follows:

"Mr. H. A. Burnham, Rainier, Wash.

"Dear Sir: We note that the watchman, Mr. Lawrence, has been let out, and we trust that you will keep some sort of supervision over this property of ours until such time that we can get matters straightened out between ourselves and Mr. Hill. It is our intention to at once take steps in regard to the matter contained in the affidavit given your attorney by us, and we would like to have your attorney call on Mr. F. A. Huffer at his office in the Bank of Commerce Bldg., this city, and confer with him in reference to that matter. It would also be well to have you present at the same time in order to verify any statements made in the affidavit, as well as to give our attorney any further information that he may need. Yours truly,

"Washington Machinery Depot,
"By C. O. Bosse, President."

The watchman was not discharged at that time, but was continued by the receiver and subsequently by the trustee in bankruptcy, and the custody of the property remained in the possession of the United States district court through its trustee, until July 14, 1910, when by order of that court it was abandoned as "burdensome." The plaintiff was then in possession of the property. On September 20, 1910, the defendant notified the plaintiff that he, defendant, had sold some of the trucks, but the plaintiff refused to deliver possession to the purchaser. Soon after that time, the plaintiff made demand upon the defendant for compensation, at the rate of \$150 per month, as caretaker, from September 3, 1909, to the date of the demand in September, 1910. The defendant refused to pay this demand, for the reason stated that plaintiff was interested in the property as a purchaser and that there was no employment of the plaintiff by the defendant. On November 18, 1910, the defendant was proceeding to retake possession of the machinery under the terms of the contract of conditional sale. On the next day this claim

of lien sued upon was filed in the office of the county auditor, and this action was at once begun to foreclose the lien claim and to restrain the removal of the property. A restraining order was issued in the case.

Several questions are presented upon the record, but it seems so clear that there was no contract of employment that we shall not consider any other question. The possession of the property was delivered to the plaintiff under conditional sale contracts. The title was reserved in the vendor. It was the duty of the plaintiff to take care of the property while it was in his possession. The contract so provides, for it says: "If plaintiff shall fail or neglect to take proper care of any of said property" the defendant may take possession, etc. When the possession of the property was taken from the plaintiff by the bankruptcy proceedings and when the defendant supposed the watchman for the receiver in bankruptcy was about to leave the property without protection, the latter wrote the letter above quoted, stating: "We note that the watchman, Mr. Lawrence, has been let out, and we trust that you will keep some sort of supervision over this property of ours until such time that we can get matters straightened out between ourselves and Mr. Hill." Mr. Hill was interested in the property by reason of the contract with the plaintiff. This was clearly not a contract of employment. The letter called upon the plaintiff to do only what he was bound to do under the conditional sale contract with the defendant. If the defendant at that time had resumed possession of the property, so that the plaintiff had been released entirely from the contract and had no further interest in the property, some claim might thereafter have been reasonably made for services as caretaker; but such is not the fact. The plaintiff claimed under this conditional sale contract until the last, and refused to permit the defendant to take possession of or to remove the property. In short, the plaintiff does not contend that the conditional sale contract had been rescinded, or that the property had been redelivered to the plaintiff. Un-

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til that occurred, the defendant held the title, while the plaintiff held possession and was bound to care for the property while in his possession. There is nothing in the record or the letter which shows an employment of the plaintiff by the defendant for wages.

The judgment is reversed, and the cause ordered dismissed.

Crow, C. J., PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10317. Department Two. March 6, 1913.]

SEATTLE & PUGET SOUND PACKING COMPANY, *Respondent*,
v. THE CITY OF SEATTLE *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS—WATER MAINS—DAMAGES—NEGLIGENCE EVIDENCE—SUFFICIENCY. In an action for damages from water escaping from a city main, there is sufficient evidence of the negligence of the city, where it appears that a terminal of considerable dimensions was closed by a cap held by braces carried back some distance to an embankment of earth, that service pipes near the end were subsequently put in, and not made water tight, and escaping water loosened the earth and caused the cap to give way under the pressure of the water.

TRIAL—MOTION FOR DIRECTED VERDICT—EVIDENCE SUBSEQUENTLY ADMITTED. After a challenge by one of the defendants to the sufficiency of the evidence is overruled, the plaintiff is entitled to the benefit of any evidence that may later be admitted on a trial of the issue against a codefendant; since a plaintiff does not rest at his peril, and may be allowed to reopen his case.

Appeal from a judgment of the superior court for King county, Gay, J., entered February 24, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

James E. Bradford and *William B. Allison*, for appellants.

Revelle, Revelle & Revelle, for respondent.

FULLERTON, J.—The respondent, Seattle & Puget Sound Packing Company, recovered against the city of Seattle for

¹Reported in 130 Pac. 493.

damages caused its stock of goods by water escaping from one of the city's water mains. The action was brought against the city and MacAdam & Company, jointly; the last named company being the contractors who laid the main from which the water escaped. On the trial, at the conclusion of the respondent's case in chief, each of the defendants challenged the legal sufficiency of the evidence to make a case sufficient for the jury and moved for a directed verdict. The challenges and motions were denied, whereupon MacAdam & Company introduced evidence on their own behalf and rested. The city announced that it would introduce no evidence on its behalf but would stand on the record as made. Both defendants thereupon renewed their challenges to the sufficiency of the evidence, and again moved for directed verdicts. The court granted the challenge and motion of MacAdam & Company, but denied the challenge and motion of the city. Judgment was afterward entered against the city, from which it appeals.

The only question discussed in the brief of the city is the legal sufficiency of the evidence to sustain the judgment. Its attorneys argue that, before any recovery could be had, it was incumbent on the respondent to show that the city was guilty of some act of commission or omission which permitted the water causing the injury to escape from the water main, and that there is no such evidence in the record. We cannot, however, accept this view of the record. To our minds it shows both acts of commission and omission which were directly responsible for the escape of the water. It appears that the main was of considerable dimensions and that the terminal end thereof was closed by a cap placed over it which was held in place by braces made of timbers and carried back some little distance to an embankment where they found support against the solid earth. That, after the cap had been in place for some time, the city's employees tapped the main some five feet from its end and placed therein service pipes which were extended to the nearby dwellings. These service pipes were

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laid over and through the timbers bracing the cap, were not absolutely water tight, and suffered more or less water to escape. The effect was to soften the earth surrounding the timbers, causing them to loosen, and, together with the cap, to give way to the pressure of the water. Clearly there were here acts of negligence on the part of the employees of the city sufficient to support a judgment for damages caused by the escaping water.

Some of the facts we have recited appeared in the testimony of the witnesses produced by MacAdam & Company in support of their defense after the respondent had rested and after the city had challenged the legal sufficiency of the evidence. The city's brief proceeds on the theory that this evidence cannot be considered in determining the question of the legal sufficiency of the evidence against its challenges, but we think the rule otherwise. Under the practice in this state, a plaintiff does not rest at his peril. On the contrary, should a challenge be interposed to the legal sufficiency of his evidence which the trial judge should deem well taken, it would be an abuse of discretion, under all ordinary circumstances, to refuse to allow him to reopen his case and supply the omitted proofs if he requested so to do. In this case, had the trial judge sustained the challenge in the place of overruling it, undoubtedly the respondent would have supplied the defect, as the evidence was within his call. Since this is so and since the evidence is now in the record, it would be but little better than farcical to send the case back to an already overburdened court for another hearing, with its accompanying waste in costs and time, simply because evidence, which abundantly sustains the judgment, did not get into the record according to the strict rules of practice. The appellant is not denied justice by this principle; it had its opportunity to defend on the merits, and if it failed to do so the fault is entirely its own.

The judgment is affirmed.

MOUNT, MORRIS, ELLIS, and MAIN, JJ., concur.

[No. 10665. Department One. March 6, 1913.]

ROSE HIGSON, *Respondent*, v, MARGARET J. HUGHES,
Appellant.¹

SALES—ACTION FOR PRICE—DEFENSES—FAILURE OF TITLE—RESCISION—FRAUD—DILIGENCE. Upon the sale of a lodging house, subject to three debts described as chattel mortgages, the fact that one debt was evidenced by a conditional bill of sale does not authorize the purchaser to plead "failure of title or breach of warranty of title" in an action for the purchase price, commenced long after the sale, where there was no offer to rescind, the defendant was not disturbed in her possession or prejudiced, and there was no fraud or bad faith, but a mere inadvertence in describing the debt.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 26, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Caldwell & Riddell, for appellant.

Penrose L. McElwain and *E. V. Griswold*, for respondent.

CHADWICK, J.—Plaintiff brought suit to recover on a promissory note, given in part payment for a lodging house previously sold by her to the defendant. The defendant answered, setting up a "failure of title or breach of warranty of title to the property conveyed." From a judgment in favor of plaintiff, defendant has appealed.

The first contention made in the briefs goes to the facts of the case. It will serve no purpose to review them. We have read the record and agree with the trial judge that plaintiff is entitled to recover, unless there was a breach of covenant of title. A part of the consideration for the property sold was the assumption on the part of the defendant of three several debts described in the bill of sale as chattel mortgages. One of these items of debt was in fact evidenced by a conditional bill of sale. The court found, and we think properly

¹Reported in 130 Pac. 478.

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so, that there was no intention to defraud, that the debt was described and understood, and that the use of the words, "chattel mortgage" was an inadvertence. It may be admitted that there is a difference between the legal effect of the chattel mortgage and a bill of sale. In case of foreclosure, the mortgagor might pay the debt at any time before judgment and release the property; whereas, if possession is taken under a conditional bill of sale, no grace or time would remain in the vendee. But we do not think this rule, if it be a rule, should obtain in all cases and without qualification. This action was begun by the vendor long after the sale and after a deferred payment had matured. It nowhere appears that the vendee has been, or will be, disturbed because of the difference in the character of the instruments evidencing the debt. The time elapsing would imply that she was willing to accept the property whether covered by chattel mortgage or a conditioned sale, and meet the debt when due; for, if she had desired in the first place to rely upon the alleged misrepresentation, she could have brought an action to rescind at once. This she did not do, but has contented herself by keeping and conducting the lodging house and offering rescission only as a defense. The general rule is that failure of title operates as a failure of consideration, and so long as the purchaser is not disturbed in his possession, he cannot plead rescission upon suit for the purchase price unless the seller was guilty of fraud in relation to the title. 35 Cyc. 542.

Whether this rule prevails in its entirety in this state (*Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032), we do not now decide; but it is certain that rescission is a doctrine sustained by reference to equitable principles, and must be resorted to within a reasonable time after the defect or breach of warranty is known or might have been known. As a defense to an action at law, rescission is not favored. The burden of acting and acting promptly is on the one asserting the right to rescind. To act only after the lapse of time and upon suit to recover the purchase price, nothing appearing

to excuse the delay, will bar the right to rescind. The case of *Baker v. McAllister*, 2 Wash. Ter. 48, 3 Pac. 581, is relied upon by appellant. Without questioning that case or its proper application to the existent facts, we think where bad faith is not proved and cannot be imputed to the seller and time has elapsed, that the later case of *Decker v. Schulze*, 11 Wash. 47, 39 Pac. 261, 48 Am. St. 858, 27 L. R. A. 335, is more in point. In the first case there was a "lien not known to the vendee," and the property was taken by the claimant through no fault of his own. Here there was no concealment of any material fact; the defendant has not been disturbed; she has not moved upon her right, but has retained the property. She has not done equity, nor has she been vigilant, and therefore she cannot recover.

Judgment affirmed.

CROW, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 10802. Department One. March 6, 1913.]

H. G. KELLEY, *Appellant*, v. G. Y. SAKAI *et al.*,
Respondents.¹

JUDGMENT—RES JUDICATA—BAR—MATTERS CONCLUDED—DENIAL OF MOTION TO VACATE. An order denying a motion to vacate a judgment for want of service of process, for the reason that an order on a previous similar motion had finally disposed of the matter, is *res judicata* and a bar to a subsequent action to set aside the judgment for want of service of process.

JUDGMENT—ACTION TO SET ASIDE—PLEADING. An allegation in a complaint to set aside a judgment, that plaintiff believes the judgment creditor to be a fictitious person, is neutralized by an allegation that he is a resident of the county.

SAME. The denial of a motion to vacate a default judgment is *res judicata* and a bar to an action to set aside the judgment on the ground that the plaintiff was a fictitious person; since the objection goes to the merits of the case.

¹Reported in 130 Pac. 503.

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APPEAL—RECORD—MOTION AND ORDERS. The denial of a motion for a change of venue will not be reviewed on appeal, where neither the motion nor order is brought up in the record and the sufficiency of the application ascertained from anything in the record.

APPEAL—RECORD—AFFIDAVITS. The supreme court cannot consider affidavits, filed long after judgment, and not made a part of the bill of exceptions or statement of facts.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 25, 1912, dismissing an action to vacate a judgment, after a trial on the merits. Affirmed.

R. B. Brown and Thomas R. Horner, for appellant.

Hamlin & Meier, for respondents.

PARKER, J.—The plaintiff commenced this action to procure a decree setting aside a judgment rendered against him in the superior court for King county, upon the ground that the judgment was rendered without any service of summons upon him. The trial court denied the relief prayed for and dismissed the action, being of the opinion that the validity of the judgment had been finally adjudicated against the contentions of the plaintiff, in former proceedings prosecuted by him in the superior court for King county, wherein he sought to have it set aside. The plaintiff has appealed.

The controlling facts touching the question of former adjudication appear beyond controversy in the pleadings. The trial court disposed of the cause upon these facts, rejecting offered evidence upon the other questions raised. These facts may be summarized as follows: In September, 1908, an action was commenced in the superior court for King county, by respondent G. Y. Sakai against appellant H. G. Kelley, to recover the sum of \$271.80 for services rendered. Thereafter proof of personal service of the summons and complaint upon appellant, plaintiff in this action, was made by affidavit of a private citizen. Thereafter appellant, having failed to appear and answer in that action within the time prescribed by

law, was by the court adjudged to be in default, and thereafter judgment was accordingly rendered against him as prayed for. Referring to the judgment and proof of service, appellant alleges in his complaint:

"That the said judgment so entered as aforesaid was fraudulently obtained and is void for the following reasons, to wit: That said purported affidavit of personal service upon the defendant therein, H. G. Kelley, plaintiff herein, is false and untrue in that no service whatever was ever had upon said Kelley. . . ."

About ten months after the rendering of the judgment, appellant moved the court to set aside the judgment, alleging as grounds therefor:

"That the defendant H. G. Kelley was never served with process in this action and the court was without jurisdiction to render judgment against said defendant."

This motion was signed by his attorney and was supported by the affidavit of himself attached thereto. Thereafter this motion, coming on for hearing, was by the court denied, the court in its order assigning as its reason therefor that the motion was not accompanied by an affidavit of merits. Thereafter appellant made another motion to vacate the judgment, alleging as grounds therefor the same facts in substance as in his first motion. This second motion stated that it was based upon the affidavit of H. G. Kelley, this appellant, filed therewith. We assume that this was an affidavit verifying the allegation of no service of summons, and also an affidavit of merits, though the affidavit does not appear in this record. Thereafter this second motion to vacate the judgment was regularly brought on for hearing before the court, when it was disposed of by the following order:

"Now in open court, the above entitled matter coming on for hearing, and trial, Hon. Ben Sheeks, judge presiding, parties appearing, the plaintiff, F. A. Gilman, his attorney, and the defendant, H. G. Kelley, in person and by A. P. Moran, his attorney. Said cause was heard and tried upon the motion of the defendant Kelley filed in this court on the 31st

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day of December, 1910, and the evidence of the respective parties being adduced and heard and the court being fully advised in the premises, it is hereby ordered that said motion be and the same is denied for the reason that the matters therein have been heretofore adjudicated against defendant, H. G. Kelley. To which order defendant Kelley excepted and exception allowed.

“Dated January 27th, 1911. Ben Sheeks, Judge.”

Thereafter H. G. Kelley, this appellant, appealed from that disposition of his second motion, to this court, which appeal was thereafter dismissed because of the insufficiency of the record brought up to enable the court to review the correctness of the order. Our decision upon that appeal is reported in *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190. F. A. Gilman was made a defendant in this action because he filed and claimed a lien upon the judgment, he having been attorney for Sakai in that action.

Does the order of the superior court disposing of the second motion to vacate the judgment, and the dismissal of the appeal therefrom by this court, render final as against appellant the validity of the judgment here sought to be vacated? It seems to us that this question must be answered in the affirmative. It is manifest that both the first and second motions to vacate the judgment, as well as this action, all had the same object in view, to wit: the vacation of the judgment upon the ground that appellant had never been served with summons in the action. If we were here concerned with questions of error of the superior court in denying appellant's first and second motions to vacate the judgment, it is not impossible that both could be shown to have been erroneously denied. But we have no such question here and could not have, because this is not an appeal or proceeding to review either of these orders. Of course, there was no want of jurisdiction in making them. Nor are we here concerned with the question of the finality of the first order as an original question. It will be noticed that the second motion was denied for the reason that the questions raised thereby had theretofore been formally adjudi-

cated against the appellant. We assume for argument's sake that the former adjudication there referred to was that made by the first order denying the motion to vacate, though we have nothing before us so showing. This second order was, in any event, a final adjudication upon the effect of the first order or possibly some other order or judgment. The exact nature of the order or judgment constituting the adjudication mentioned in the second order, however, is wholly foreign to the question here involved, because this second order finally adjudicated that there had been a former adjudication as to the validity of the judgment against appellant, and, as we have noticed, we are not here reviewing the correctness of the second order. That order was attempted to be reviewed on appeal, which being dismissed left it in full force and effect as an adjudication that there had been a former adjudication.

It has become the settled law of this state by the repeated decisions of this court, that an order denying a motion to vacate a judgment is a bar to any subsequent proceeding, whether it be by motion or an independent action seeking the same relief. The subject is noticed at some length in *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. 1005, where our former decisions are reviewed. In the later case of *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119, Justice Rudkin, speaking for the court, said:

"In the case of *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955, it was held that our statute affords a full, complete, and adequate remedy against an illegal judgment by authorizing the aggrieved party to proceed by motion to vacate and set aside, and permitting an appeal from an order entered on such motion, and that one who has attacked a judgment by motion to vacate, and has failed to prosecute an appeal from a denial of his motion, cannot subsequently maintain an action to cancel the judgment, since the question of the validity of the judgment is *res judicata*. The doctrine announced in that case was reaffirmed in *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164, and in the recent case of *Meisen-*

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heimer v. Meisenheimer, ante p. 32, 104 Pac. 159, and has become the settled law of this state."

Newell v. Young, 59 Wash. 286, 109 Pac. 801, reaffirms this view. We are of the opinion that the order denying the second motion to vacate the judgment became a final adjudication as to the validity of the judgment against appellant.

Some contention is made in behalf of appellant upon the theory that the complaint alleges facts showing that there is no such person as the respondent Sakai, that therefore respondent Gilman had no authority to represent Sakai in procuring the judgment, and that appellant was entitled to introduce evidence so showing in this case. The only allegations of the complaint which could possibly be considered as tendering this issue are that:

"Plaintiff believes that said Sakai is a fictitious character; that he does not know any such person as G. Y. Sakai; that he is not indebted to said Sakai in any sum whatever, and at no time had any contractual relation with him."

If these allegations be deemed sufficient for the purpose claimed, their force is entirely destroyed by the first allegation of the complaint, reading as follows: "That the defendants and each of them are residents of said King county, Washington, wherein this cause of action arose."

Another answer to this contention is that these questions relate to the merits of the case in which the judgment was rendered. In its final analysis, this contention is simply that appellant is not indebted to Sakai. That is the very question adjudicated against appellant by that judgment, which, as we have seen, has since been adjudged to be a valid judgment. It seems clear to us that these are not issues properly in this case.

It is contended that the trial judge erred in denying appellant's motion for the transfer of the case to another department of the court, on account of the prejudice of the judge of the department where the case was pending. The court evidently denied the motion upon the ground that it was not

timely made. No such motion was filed until long after the judgment of dismissal was rendered and the statement of facts settled. A motion of this nature seems to have been presented to the court just before trial without notice to or knowledge of respondent's counsel, which was at the same time denied by the court. The only record made of that motion and its disposition is the statement of the trial judge, embodied in the statement of facts made when he rendered his oral decision and directed entry of the judgment of dismissal, when counsel for appellant asked to have his exception to the denial of the motion noted. This was the first intimation counsel for respondents had that there had been any such motion. The judge then stated:

"I do not think the statute requires that when a motion for a change of venue is made that motion must be served on the other party. I don't know whether it is the custom or not to do that. But for the benefit of the record I state that the motion was presented yesterday and as I stated this morning I did not know that motion was being made until just at the commencement of the trial and if it had been made at the proper time the court would of course have complied with the statute and granted it."

The statement of facts showing this was settled and certified July 26, 1912, at which time no other record of the presenting or disposition of the motion had been filed or made in the case. Taking this as the only proper record of the motion and its disposition, it is manifest that we cannot say the court committed error in denying it, since neither the motion nor the affidavit supporting it are before us to enable us to determine their sufficiency. If they were before us it might appear that the attempted showing was not in compliance with the statute. We are inclined to agree with the trial court that the motion was not timely made in view of former proceedings in the cause before the same judge; but even if the judge was in error as to his reason for denying the motion, it does not follow that there may not have been other valid reasons for its denial. *Sakai v. Keeley, supra.*

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Syllabus.

On September 23, 1912, long after the trial and rendering of the judgment and even two months after the settlement of the statement of facts, a motion, accompanied by affidavit in usual form asking for transfer of the case to another department, was filed with the papers in the case. This motion purports to have been dated before the date of the trial, but we have no means of knowing that it is the same motion presented to the judge before the trial, since it was not then of record, nor is it made part of the statement of facts. We cannot, upon this record, say that the trial court erred in denying appellant's motion for transfer of the case to another department of the court.

The judgment is affirmed.

Crow, C. J., Gose, Mount, and Chadwick, JJ., concur.

[No. 10967. Department One. March 6, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. GORDON
McPHERSON, *Appellant*.¹

HUSBAND AND WIFE — NONSUPPORT — INFORMATION — SUFFICIENCY. An information for nonsupport, under Rem. & Bal. Code, § 2444, is sufficient where it follows the language of the statute.

SAME — NECESSITOUS CIRCUMSTANCES — EVIDENCE — SUFFICIENCY. Upon a prosecution for nonsupport of a wife there is sufficient evidence of "necessitous circumstances" within Rem. & Bal. Code, § 2444, where it appears that she had been pregnant for five or six months, and had no money and no means to make monthly payments of \$10 on her furniture, and left to live with her mother at defendant's direction.

SAME — WILFUL NEGLECT — EVIDENCE — SUFFICIENCY. There is sufficient evidence of wilful refusal to support a wife, where the defendant testified that he was earning \$9 per week as clerk, and it appears that he represented that he was getting \$15 per week and expected a raise, and demurred to his wife's getting a lodging house and keeping roomers, but sent her away to her mother, and he contributed nothing toward her support for three months prior to the trial.

¹Reported in 130 Pac. 481.

SAME—NECESSITOUS CIRCUMSTANCES — EVIDENCE — ADMISSIBILITY. In a prosecution for nonsupport, evidence of the wife's pregnancy is admissible to prove her necessitous condition.

INFANTS—CRIMES—MINOR HUSBAND—NONSUPPORT. A husband under twenty-one years of age may be punished for nonsupport, under Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to desert or wilfully refuse to support his wife; since he is not subject to trial only as a delinquent child, under Rem. & Bal. Code, §§ 1987-2004, as that act provides that delinquent children may be tried under the criminal code.

HUSBAND AND WIFE—NONSUPPORT—MINOR HUSBAND. Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to desert or wilfully neglect to support his wife, applies to a voidable marriage between minors, until a decree of annulment is entered by a court of competent jurisdiction.

SAME—"NECESSITOUS CIRCUMSTANCES"—INSTRUCTIONS. Under Rem. & Bal. Code, § 2444, providing that "every person who shall wilfully and without lawful excuse desert, or wilfully neglect or refuse to provide for the support and maintenance of his wife . . . being in necessitous circumstances, shall be punished" etc., the words "necessitous circumstances" qualify all the preceding words, and it is error to instruct that the accused would be guilty if (a) he deserted his wife without lawful excuse, or (b) wilfully failed to support her, she being in necessitous circumstances.

SAME—NONSUPPORT—JUDGMENT — MINOR HUSBAND. Upon conviction of wife desertion or nonsupport by a minor husband, a judgment of imprisonment should be limited to the continuance of the marriage state, the marriage being voidable.

INFANTS—CRIMES—PUNISHMENT. Under Rem. & Bal. Code, § 1998, relating to the punishment of delinquent children, a minor husband convicted of nonsupport should be confined apart from adult convicts.

Appeal from a judgment of the superior court for King county, Ronald J., entered May 22, 1912, upon a trial and conviction of wife desertion. Reversed.

Geo. McKay, for appellant.

John F. Murphy and *Thomas J. L. Kennedy*, for respondent.

Gose, J.—The charge against the defendant is that on the 7th day of February, 1912, he wilfully and without law-

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ful excuse deserted, and wilfully neglected and refused to provide for the support and maintenance of, Louise McPherson, his wife, she then being in necessitous circumstances. The verdict was "guilty as charged." A judgment was thereupon entered, whereby it was ordered and adjudged that he be punished "by confinement in the county jail of the county of King" for the term of twelve months, and that execution of the sentence be stayed on condition that he file a bond, in the sum of \$1,000 with sureties to be approved by the court, for the payment of \$5 weekly to and for the benefit of his wife. The defendant has appealed.

His first contention is that his demurrer to the information should have been sustained because of the failure to allege a continuing neglect. The information follows the language of the statute and is not vulnerable to a demurrer. Rem. & Bal. Code, § 2444; 21 Cyc. 1613, 1614. The statute makes it a crime for the husband wilfully and without lawful excuse to desert, or to wilfully neglect or refuse to provide for the support and maintenance of his wife, if she is in necessitous circumstances. This is covered by the information.

It is further contended that there is no evidence that the wife was in necessitous circumstances. The facts pertinent to this inquiry are, that the appellant was married to his wife on the 10th day of December, 1911; that he was 16 years of age in the month of July preceding; that she was 17 years of age in the month of October preceding; that they lived with the wife's mother for a short time, and thereafter lived in apartments until the 11th day of February, 1912; when she returned to her mother's home at his command, and that thereafter she lived with her mother and stepfather, and he lived with his parents. She testified that she had been pregnant five or six months at the time of the separation. When they left their apartments they had about three days' provisions in the house. The wife testified that she had no money, and her mother said that the wife had no means to make the payments upon the furniture, which were \$10 per month.

Upon these facts the jury was warranted in finding that the wife was in necessitous circumstances.

It is argued that the evidence does not show a wilful neglect or refusal to provide for the support and maintenance of the wife. The appellant testified, that he was earning \$9 per week as a clerk in a department store at the time of the separation; that his salary was not sufficient to meet the necessary family expenses; that his wife promised to do outside work and did not, and that he was driven to the extremity of sending her to her mother. The wife and mother testified that the appellant represented to them that his salary was \$15 per week, and the mother said that he told her that he was expecting a raise in his salary. The wife told him that she would get a lodging house and keep roomers, and that her mother would supply such furniture as they needed. To this offer he demurred. Between the date of the separation and the trial three months later, the appellant contributed nothing toward the support of his wife. His confession of his inability to support his wife is not to his credit. It shows a moral cowardice that few young men would confess. The prosecuting attorney very pertinently asked him if he was the only married clerk in the city. The court properly instructed the jury that it is the duty of the husband "to do the best he can" to support and maintain his wife "in the manner suitable to his station and circumstances." He contributed nothing at all to his wife's support, and the jury evidently concluded that he had not done the best he could. The contention that the evidence of the wife's pregnancy was inadmissible is without merit. It was a circumstance tending to prove her necessitous condition.

It is strenuously contended that the statute, Rem. & Bal. Code, § 2444; Laws 1909, p. 946, § 192, does not apply to a husband under 18 years of age, but that he can be punished only as a delinquent child, as defined by Laws 1909, p. 668, § 1 *et seq.*; Rem. & Bal. Code, §§ 1987 to 2004, and in the manner therein provided. Section 12 of this act provides

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that a delinquent child may be tried under the provisions of the criminal code. The argument that the abandonment statute under which the appellant was convicted does not apply to a voidable marriage is inherently unsound. The appellant was married by a regularly ordained minister, upon a license issued upon an affidavit of a third party, which falsely stated that the appellant was over 21 years of age. He was married without the knowledge or consent of either of his parents, both of whom were living. Our statute, Rem. & Bal. Code, § 7150, has established the age of matrimonial consent at 21 years in males and 18 years in females. It is provided in § 7164 that a license may be granted if consented to in writing by the father, mother, or legal guardian of the minor, where the female is under the age of 18 years and over the age of 15 years and where the male is under the age of 21 years. Our statute, Rem. & Bal. Code, § 7162, provides that, where either party to a marriage shall be incapable of consenting for want of legal age, the marriage is voidable, but only at the suit of the party laboring under the disability. It follows, we think, that it is the duty of the husband, even though the marriage is voidable, to give his wife such support as his earning ability and circumstances in life will reasonably justify, until there has been a decree of annulment entered in a court of competent jurisdiction. This conclusion is within the principle announced in: *In re Hollonpeter*, 52 Wash. 41, 100 Pac. 159, 132 Am. St. 952, 21 L. R. A. (N. S.) 847; *Hunt v. Hunt*, 23 Okl. 490, 100 Pac. 541, 22 L. R. A. (N. S.) 1202; *Willits v. Willits*, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767; *Bostick v. State*, 1 Ala. App. 255, 55 South. 260; *State ex rel. Scott v. Lowell*, 78 Minn. 166, 80 N. W. 877, 79 Am. St. 358, 46 L. R. A. 440; *Town of Northfield v. Town of Brookfield*, 50 Vt. 62.

This view is based upon the principle that, under the statute, the marriage is not void but merely voidable, and until legally annulled is valid for all civil purposes. In the *Hollonpeter* case, we said: "The ordinary legal consequences follow

his [the minor's] marriage." In the *Bostick* case, the court said that, when a minor married, "The law cast on him the legal duty of providing for his wife." In the *Willits* case, it is said:

"As before stated the marriage was valid until annulled by the court. Until it was annulled, therefore, the defendant was liable for the expenses of his family and the support and maintenance of his child."

The marriage of a minor emancipates him. *In re Hollopeter, supra*; 1 Bishop, Marriage, Divorce, and Separation, § 557; *Town of Northfield v. Town of Brookfield, supra*.

"The better opinion now is that parties marrying before the age of consent may dissent to the marriage within non-age, and thus avoid it *in toto*." Tyler, Infancy and Coverture (2d ed.), § 81.

See, to the same effect: 2 Parsons, Contracts (9th ed.) p. 83; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; *State v. Lowell, supra*. The reason for the rule is thus stated in the *Eliot* case:

"If the plaintiff had capacity to become a party to such imperfect and inchoate or conditional marriage, he should have capacity to disaffirm it at any time thereafter, before it has ripened into an absolute marriage, by invoking the authority of the court to annul it under the statute. No good reason is perceived why the parties should be compelled to remain in so unfortunate a position until the plaintiff becomes eighteen years of age."

The opinion of this court in the *Hollopeter* case is based on this principle. The right to annul such a marriage is given by statute, and this construction will more nearly protect the right than the construction contended for by the appellant, *i. e.*, that the right is unavailing during non-age. In *State v. Lowell, supra*, it was held that the marriage of a minor above the age of consent established by the common law—14 years for males and 12 years for females—emancipates the child from the custody of the parent, is voidable only, and must be treated as valid for all civil purposes until annulled by judi-

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cial decree at the election of the party under age of legal consent, "to be exercised at any time before reaching such age or afterwards if the parties have not voluntarily cohabited as husband and wife."

The court instructed the jury: (a) "So, the question in this case is: Did this defendant desert his wife without lawful excuse? If he did, he is guilty," and (b) "If you find that he has not wilfully failed to support and maintain her, she being in necessitous circumstances, then you will find him not guilty. If you find he has failed wilfully, she being in necessitous circumstances, then you will find him guilty as charged." The statute, Rem. & Bal. Code, § 2444, upon which the charge is rested, provides:

"Every person who shall wilfully and without lawful excuse desert, or wilfully neglect or refuse to provide for the support and maintenance of his wife, or child under the age of sixteen years, either said wife or child being in necessitous circumstances, shall be punished," etc.

The words "being in necessitous circumstances" qualify all the preceding words in the section. Desertion alone is not a crime, it is only a crime when it is wilful and without lawful excuse and the wife or a child under the age of 16 years is left in necessitous circumstances. The clause of the instruction last quoted covers the whole law of the case. The record shows that the appellant claimed immunity from liability to support on two grounds: (1) because the marriage is voidable, and (2) because of his inability to support his wife. As we have seen, neither of these grounds is tenable as a matter of law. The instruction first quoted was wrong and the second instruction was right. They are in direct conflict and irreconcilable, and for this error the appellant is entitled to a reversal.

In view of the fact that there will probably be a new trial, we desire to say that the judgment of the court should have been limited in point of time. It should not have gone beyond the continuance of the marital state. Section 11 of Laws of

1909, p. 674, ch. 190 (Rem. & Bal. Code, § 1998), relating to the punishment of delinquent children, provides:

“When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts, or to confine such child in the same yard or inclosure with such adult convicts, or to bring such child into any yard or building in which such adult convicts may be present.”

This clause should be embodied in any judgment hereafter entered in this case.

For the reasons stated, the judgment is reversed.

CROW, C. J., MOUNT, PARKER, and CHADWICK, JJ., concur.

[No. 9739. *En Banc*. March 8, 1913.]

VINNIE TAYLOR, *Respondent*, v. SPOKANE, PORTLAND &
SEATTLE RAILWAY COMPANY, *Appellant*.¹

CARRIERS—INJURY TO PASSENGERS—EVIDENCE—RELEVANCY. Upon an issue as to the amount of damages sustained by a passenger in a head-on railway collision, a photograph of the wrecked train is competent to show the result of the impact (CROW, C. J., and MORRIS and CHADWICK, JJ., dissenting).

EVIDENCE—DAMAGES—MENTAL SHOCK—RES GESTAE. Upon an issue as to the amount of damages sustained in a railway collision by a passenger who was thrown to the floor and suffered traumatic neurasthenia, it is error to admit evidence that some time after she saw other passengers covered with blood, being transferred to the city in a street car, which shock might have contributed to her condition, and heard statements made on the street car, it not being shown that those injured were in the same railway car with the plaintiff and the statements made not being part of the *res gestae* (overruling *Id.*, 67 Wash. 96.)

TRIAL—MISCONDUCT OF COUNSEL—IMPROPER ARGUMENT. It is error to refuse to require counsel to desist from “improper and inflammable” statements in regard to negligence which was admitted

¹Reported in 130 Pac. 506.

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in the case, and the same may be prejudicial, requiring a new trial, when taken in connection with erroneous evidence admitted, and the fact that the trial judge reduced the verdict as excessive (overruling *Id.*, 67 Wash. 96.)

Crow, C. J., dissents.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 14, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action by a passenger for injuries sustained in a collision. Reversed.

Cannon, Ferris, Swan & Lally, for appellant.

Robertson & Miller, for respondent.

ON REHEARING.

MOUNT, J.—A rehearing was granted in this case, and it has been reargued to all the judges sitting *en banc*. A fair statement of the facts was made in the original opinion, which may be found in 67 Wash. 96, 120 Pac. 889. The facts need not be restated here.

Upon this rehearing, we have concluded that a new trial must be granted for the errors hereinafter noticed. As stated in the former majority opinion, "appellant did not dispute its negligence; nor did it deny its liability for any injuries which may have resulted to respondent" on account of the collision of the appellant's trains. "The controlling question was the amount of damages to be awarded." The appellant denied that the injury which the respondent received was caused by the collision. In the former opinion, the majority sitting on the first hearing said, in reference to certain photographs which were received in evidence, "We fail to see the materiality of the photograph, or that its admission was prejudicial." We are of the opinion now that this photograph was properly admitted to show the probable force of the impact of the train, because it is a well known fact that a collision which will crush a car is reasonably certain to cause injury to passengers within the car. The force of the

impact, therefore, is a material matter to be considered in determining whether or not the passenger was actually injured upon the car. A photograph taken of the car at the time is competent to show the result of the impact, the same as oral evidence of that fact. *Maynard v. Oregon R. Co.*, 46 Ore. 15, 78 Pac. 983, 68 L. R. A. 477.

We are satisfied, however, that the court erred in admitting in evidence the fact that, after the plaintiff was taken upon a street car, she saw there other passengers who were covered with blood and heard statements made by persons on the street car at that time. It was not shown that these persons were in the same car with plaintiff at the time of her injury, but it is shown that the injured man referred to in that conversation was brought out of the mail car, which was not the car in which the plaintiff was riding at the time of the collision. The statements were made some time after the accident and away from the scene of the accident, where no officer of the company was present. The respondent says: "the conductor said to him;" but by that statement, she plainly meant the conductor upon the street car, as the fact was, and she did not mean the conductor of the train which was wrecked. The conversation, therefore, could not have been a part of the *res gestae*.

The fact that the plaintiff saw persons covered with blood upon the street car, and that the sight of mangled persons might cause a shock which would contribute to the plaintiff's condition, was wholly immaterial and improper, because "mental distress caused by sympathy for another's suffering is not a recoverable element of damages." 8 Am. & Eng. Ency. Law (2d ed.), 64.

"Were the rule otherwise, each passenger in a railroad wreck might claim the right to recover, not only for the distress of mind which arose from his own injuries, but also for that which he sustained from contemplating the mangled condition of his fellow passengers . . ." *Pullman Palace Car Co. v. Trimble*, 8 Tex. Civ. App. 335, 28 S. W. 96.

The plaintiff was entitled to recover for the injuries inflicted upon her by the wreck, but not for that which took place or what she saw or heard upon the street car at some other place. All this evidence was, therefore, erroneously admitted.

We are also satisfied that the closing argument of counsel for the plaintiff, as noted in the majority opinion, was prejudicial, and that the trial court should have required counsel to desist from discussing a question of negligence which was admitted in the case, and should have instructed the jury to disregard it. If that were the only error in the case, we might agree that this was cured by the trial court when a reduction was made in the award of the jury. But when we consider these "improper and inflammable" statements in connection with the erroneous evidence above referred to, and in connection, also, with the fact that the trial court ordered a reduced verdict in the belief that it was excessive, we must conclude that the jury was influenced thereby and prejudiced to such an extent that the appellant did not have a fair trial before an impartial jury, and that a new trial should be granted. It is so ordered.

The judgment is reversed.

PARKER, ELLIS, FULLERTON, GOSE, and MAIN, JJ., concur.

MORRIS, J. (concurring)—I concur in the reversal, but I am still of the opinion, for the reasons expressed in my dissent to the first opinion, that the photographs were improperly received in evidence.

CHADWICK, J., concurs with MORRIS, J.

CROW, C. J. (dissenting)—I dissent. The only question to be determined by the jury was the amount of damages to be awarded to the respondent. As stated in the original opinion:

"The only possible effect of the misconduct of which appellant complains would be upon the amount of damages award-

ed. The trial judge, in the exercise of his discretion, reduced the damages awarded by the jury, and denied the motion for a new trial on condition that respondent consent to such reduction, which she did. The trial judge saw the respondent, knew her condition, heard the evidence and the arguments of counsel, and in the exercise of his judgment and discretion, concluded that the damages for which judgment was finally entered would not be excessive. He corrected any prejudicial effect that may have resulted to appellant either from misconduct of counsel or from rulings on the admissibility of evidence, even though such rulings be regarded as technically erroneous. The only purpose of a new trial in this action would be to fix compensatory damages to which the respondent is entitled. That purpose has already been accomplished, through the medium of the former trial, the verdict of the jury, and the final action of the trial judge."

This being true, I am still of the opinion that the judgment should be affirmed.

[No. 10486. Department Two. March 8, 1913.]

FRANK H. GRAVES, *Appellant*, v. GEORGE E. STONE, *Sheriff of Spokane County et al., Respondents*.¹

PAYMENT—PRESUMPTIONS—LAPSE OF TIME. While the presumption of payment arising from lapse of time, in connection with other circumstances, applies to taxes, it is not a bar, but is rebuttable and affects only the burden of proof.

TAXATION—PAYMENT—EVIDENCE—SUFFICIENCY. A finding that personal property taxes had not been paid is sustained, notwithstanding the presumptions arising from the lapse of ten years and the fact that the taxpayer was morally certain that he had paid them ten years before by check, where it appears that he allowed his real property taxes to go delinquent the same year and redeemed them later, and the treasurer's books showed that they had not been paid (FULLERTON, J., dissenting).

¹Reported in 130 Pac. 369.

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Opinion Per MAIN, J.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 4, 1912, dismissing an action for an injunction, after a trial on the merits. Affirmed.¹

Graves, Kizer & Graves, for appellant.

John L. Wiley and O. J. Saville, for respondents.

MAIN, J.—This action was brought to restrain the collection of a tax on personal property. The appellant, at the time of the institution of the action, had resided in Spokane for about twenty-seven years. Prior to and during the years 1900, 1901 and 1902, he had a large amount of real and personal property, not encumbered, including household goods, law library, money in bank and bills receivable. Prior to the years mentioned, the appellant and one George Turner were law partners, owning a law library and office fixtures upon which the appellant paid the taxes, including those for the year 1900. On February 28, 1901, the appellant paid some personal property taxes assessed to him on the capital stock of the LeRoi Mining Company for the year 1898; and on February 20, 1900, appellant paid his personal property taxes for the year 1899; but, according to the records in the county treasurer's office, his personal property tax for the year 1900 has never been paid. Appellant permitted the taxes upon his real estate for the year 1900 to become delinquent, and certificates of delinquency were issued against the same and redeemed by the appellant on August 19, 1901. On December 10, 1910, a letter was sent to the appellant by the county treasurer, notifying him of the amount of his personal property tax for the year 1900, and requesting payment of the same. With reference to the personal property tax for the year 1900, the appellant testified as follows:

"I have paid for a personal property tax for the year 1900, as I paid my personal property taxes for every year before and since then. I paid it by check drawn to the order

¹Rehearing *En Banc* ordered.

of the county treasurer. I cannot remember the day on which I paid it, to whom I paid it, whether I myself delivered the check to the treasurer, or his deputy, whether I mailed it to him, or whether I sent some one from my office to do it. I can't remember the particular circumstances of paying it. I simply remember the fact that I did pay it."

He also testified he had no checks or stubs running back of the year 1905 or 1906, and no receipts for personal property taxes before the year 1902. Subsequent to that time, he had, upon two occasions, moved his offices. The effect of the appellant's evidence is that he is morally certain that the tax in question has been paid. As already stated, according to the books of the county treasurer's office, the personal property tax of the appellant for the year 1900 had not been paid. The cause was tried to the court without a jury, and the court dismissed the action. From the judgment of dismissal, this appeal is prosecuted.

The question to be determined is, Do the facts stated, taken in connection with the lapse of time during which the tax was permitted to lie dormant, raise a presumption of fact that the tax in question had been paid? No statute of limitation is involved here. Indeed, the appellant in his brief concedes as much, for it is therein stated:

"We invoke no limitation statute in bar of the attempt to enforce the payment of the tax, for there is no such statute applicable. What we ask is consideration of a rule of evidence, of a presumption established by the wisdom of the ages, that because of the lapse of so great a period of time as here appears, taken in connection with the other circumstances surrounding it, the tax is deemed to have been paid."

Independent of any statute of limitations, lapse of time, when taken into consideration with other circumstances, may be sufficient to raise a presumption of fact that a debt has been paid, but lapse of time alone is not sufficient. Jones, Evidence (2d ed.), § 65; *Smith v. Tharp*, 17 W. Va. 221. What circumstances are sufficient, when taken in connection with lapse of time, to cause a presumption of payment cannot

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be accurately defined, but each case must depend upon the facts there presented. In the Ency. of Evidence, vol. 9, p. 714, this doctrine is stated as follows:

“(a) The presumptions are rebuttable, and may be overthrown by any evidence showing it to be more probable than otherwise that the debt has not been paid, (b) But a shorter period, coupled with other circumstances tending to show payment, may be sufficient to warrant a jury in making an inference of payment. There is no precise rule as to the quality or quantity of other evidence necessary. Each case must depend upon its own circumstances.”

This presumption of payment does not operate as a bar, but is simply a rule of evidence affecting the burden of proof. *In re Ash's Estate*, 202 Pa. 422, 51 Atl. 1030, 90 Am. St. 658.

The presumption of payment arising from lapse of time and circumstances applies to tax obligations as well as other debts. 2 Wharton, Law of Evidence, § 1360; 1 Rice, Evidence, p. 70; *Hopkinton v. Springfield*, 12 N. H. 328.

The final question is, Are the facts stated sufficient to justify the court in making a finding of fact that the personal property tax for the year 1900 has been paid? The probative value of these facts would be greater had it not been for the evidence that the real property taxes of the appellant for the same year were also permitted to become delinquent. We think the evidence is not sufficient to enable the court to conclude, as a matter of fact, that the tax in question has been paid.

The judgment will therefore be affirmed.

MOUNT, ELLIS, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting)—I think the evidence preponderates in favor of the view that the taxes were paid. For this reason, I dissent from the conclusion of the majority.

[No. 10786. Department Two. March 8, 1913.]

FRANK PYLE, as *Executor etc.*, Appellant, v. JOHN H. STARBIRD, *Respondent*.¹

MONEY LOANED—EVIDENCE—SUFFICIENCY. The fact that plaintiff's decedent remitted a check to the defendant does not create a presumption that the money was loaned, and an implied promise to repay is not thereby created and will not be found from the fact that decedent in her lifetime commenced an action to recover the same, where defendant's contention that it was to repay advances and for services rendered was supported by the testimony of several persons who were witnesses to the transactions.

Appeal from a judgment of the superior court for King county, Myers, J., entered June 7, 1912, upon findings in favor of the defendant, in an action on contract, after a trial on the merits. Affirmed.

McCafferty, Robinson & Godfrey, for appellant.

Revelle, Revelle & Revelle, for respondent.

PER CURIAM.—The appellant, as executor of the estate of Emma Starbird, deceased, brought this action against the respondent to recover the sum of \$350, alleged to have been loaned the respondent by Mrs. Starbird in her lifetime. After issue had been joined on the complaint, a trial was had by the court sitting without a jury, and resulted in findings and a judgment for the respondent, from which the executor appeals.

From the record, it appears that Mrs. Starbird, some months preceding her death, remitted to the respondent by check the money for which the administrator sues. No writing passed between the parties showing the purpose of the remittance, but Mrs. Starbird afterwards claimed that the remittance was a loan, and placed the claim in the hands of her counsel for collection. Under the advice of her counsel, a letter was written to the respondent demanding payment.

¹Reported in 130 Pac. 477.

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Syllabus.

To this the respondent answered denying liability, seemingly resting his contention of nonliability on the ground that the money was a gift to him. In defense of the action, however, he sought to show that the money was paid him for advances made to Mrs. Starbird's use and for services he had rendered her in the conduct of a certain business in which she was engaged. Owing to the statute, he was not permitted to testify to the facts himself, but he introduced the testimony of certain persons who were witnesses to transactions between himself and Mrs. Starbird, which, while somewhat fragmentary, tended to support his contentions. On the whole, we are not inclined to overturn the findings of the trial judge. The mere showing that Mrs. Starbird, in her lifetime, remitted by check certain moneys to the respondent, does not of itself create a presumption that the remittance was intended as a loan, or create an implied promise on his part to repay the money; and such presumption as may have been raised by the fact that Mrs. Starbird sought to recover it back as a loan, we think, was overcome by the showing made on the part of the respondent.

The judgment is affirmed.

[No. 10962. Department Two. March 8, 1913.]

JOHN GRAVES, *Appellant*, v. TACOMA RAILWAY & POWER
COMPANY, *Respondent*.¹

STREET RAILWAYS—INJURY TO PERSONS IN STREETS—NEGLIGENCE. It is not negligence, as regards persons in the street, for a street car company to allow persons to ride on the steps of a loaded car, so that their bodies protruded beyond the ordinary line of the sides of the car, where the car approached slowly and an alarm was sounded.

SAME—CONTRIBUTORY NEGLIGENCE. A person intending to board a street car is guilty of contributory negligence, where it appears

¹Reported in 130 Pac. 476.

that he saw the car, approaching slowly, in time to avoid being struck by the bodies of persons riding on the steps, but failed to do so.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 30, 1912, on granting a nonsuit, dismissing an action for personal injuries sustained by one seeking to board a street car. Affirmed.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for appellant.

J. A. Shackelford and F. D. Oakley, for respondent.

FULLERTON, J. — The appellant brought this action against the respondent to recover damages for personal injuries. He was nonsuited in the court below and appeals.

The appellant lives near the line of the respondent's suburban road, which runs between the cities of Tacoma and Puyallup. Cars passing over the line of the road enter the city of Tacoma on one of its principal avenues, from whence they proceed to the heart of the city, where they turn on a loop and pass out of the city on the same track on which they enter it. In passing in and out, the cars receive and discharge passengers at all of the principal street crossings. On the evening of September 4, 1911, some form of public entertainment was given in the city of Tacoma which had attracted to the city numbers of people, many of whom, and among them the appellant, had come into the city over the respondent's road. At the close of the entertainment there was a rush to return, and the appellant, finding the usual places of boarding the cars blocked with people, went to the place where the cars made the turn for the outward journey, intending to take a car at that point. He took a position along the side of the track on the outward or convex side of the curve. Before a car arrived, a number of people having the same purpose as the appellant collected at the same place, and massed along the side of the track. Others again, anticipating that there would be a crowd wait-

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ing to take the cars at the loop, went along the track towards the approaching cars; and meeting an incoming car, boarded it before it reached the loop, loading it to its capacity. After the car was filled, the entrance gates were closed, and a number of persons mounted the steps and clung to the outside of the gates, their bodies projecting some little distance beyond the sides of the car. Loaded in this manner, the car approached the place where the appellant was standing. The front end of the car passed him without touching him, but before the rear end reached him, or about the time the rear end reached him, the people behind him surged forward, pressing him against the bodies of the persons hanging onto the rear steps, and he was dragged along in the direction of the motion of the car and injured. The car approached the place slowly, at about the speed of an ordinary walk; its gong was being sounded and its lights were burning; it was in plain view of the appellant long before it reached him, and before it reached him, as he himself testified, he "looked back and saw a crowd on the rear steps of the car."

It is alleged that the respondent was negligent in permitting persons to ride on the steps of the car outside of the gates, and that this was the proximate cause of the appellant's injuries. We have not been, however, able to take this view of the record. It is not negligence in itself, as against persons on the streets, for a street car company to permit persons to ride on the steps of its cars, even though the bodies of the persons so riding may protrude beyond the ordinary line of the sides of the cars. If such an act is negligence at all, it must be so only under peculiar circumstances; circumstances where injuries therefrom were, or ought to have been, reasonably foreseen. It is, of course, the duty of a street car company to operate its cars at all times with ordinary care, and it is true, also, that what constitutes ordinary care in the operation of a car varies with the circumstances. But clearly there is no circumstance shown here that takes the case from without the ordinary rule. The

car approached slowly; an alarm was sounded giving warning of its approach; the car was in plain view of the appellant; he observed its exact condition before it reached him, and knew that it was loaded to its capacity and that persons were clinging to the steps outside the closed gates. He had time and opportunity to escape after he had knowledge of the conditions. And when it is remembered that he had the same duty to exercise ordinary care to avoid being injured that the respondent had to avoid injuring him, it seems clear that his conduct was negligent, sufficiently so to bar a recovery even were negligence shown on the part of the railway company in the particulars alleged.

The judgment will stand affirmed.

Crow, C. J., MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 10780. Department Two. March 8, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. ALEX McBRIDE,
Appellant.¹

INDICTMENT AND INFORMATION—OBJECTIONS—TIME FOR TAKING. Objection to the sufficiency of the information cannot be made after a plea of not guilty, except by motion in arrest of judgment.

INDICTMENT AND INFORMATION—DUPLICITY—WAIVER. Under Rem. & Bal. Code, § 2105, prescribing the grounds of demurrer to the indictment or information, and § 2183, prescribing the grounds for motion in arrest of judgment, the question of duplicity can only be raised by demurrer or motion to quash or compel an election, prior to plea of not guilty, and comes too late if made after verdict.

FORGERY—INFORMATION—DUPLICITY. Under Rem. & Bal. Code, § 2583, defining forgery in the first degree as the forging of any writing with intent to defraud, and § 2587, making it forgery in the same degree to knowingly utter a forged instrument with intent to defraud, an information is not duplicitous and charges but one crime, where it charges the forging and uttering of one instrument

¹Reported in 130 Pac. 486.

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by the same person with intent to defraud in both of the statutory ways, as part of one connected transaction, continuous in point of time; as the two ways are not repugnant to each other.

FORGERY—ELEMENTS—DEFENSES. In a prosecution for forgery of a check, it is immaterial, and not a defense, that the accused used the proceeds in an unlawful gambling game conducted by the party who cashed the check.

SAME—EVIDENCE—ADMISSIBILITY. In a prosecution for forgery of a check, evidence that the person whose name was forged was indebted to the accused is inadmissible.

SAME. In a prosecution for forgery of a check, the person whose name was forged cannot be asked if he would have paid the check if it had been presented to him by a bank or any legitimate holder.

APPEAL—REVIEW—EXCEPTIONS TO INSTRUCTIONS. Exceptions to instructions, merely filed with the clerk and not called to the attention of the trial judge, cannot be considered on appeal, especially where no motion for a new trial was made.

FORGERY—PRESUMPTIONS FROM POSSESSION—INSTRUCTIONS. In a prosecution for forgery, it is error to instruct that possession of a forged check raises a presumption of guilt.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—UNLAWFUL COMMENT. In a prosecution for forgery, an instruction that possession of a forged check raises a presumption of guilt, is not an unlawful comment on the evidence, so as to constitute fundamental error that could not be waived.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered January 18, 1912, upon a trial and conviction of forgery. Affirmed.

Chas. E. Miller, for appellant.

Robert G. Chambers, for respondent.

ELLIS, J.—The appellant was convicted of the crime of forgery in the first degree, upon an information the material part of which was as follows:

“The said Alex McBride, on or about the fourteenth day of January, A. D. 1911, in Pacific county, Washington, then and there being, did then and there feloniously forge a writing, on paper, the said writing on paper being then and there an instrument by which the title of personal property was evidenced, created, acknowledged and transferred, the same

being a request for the payment of money of the tenor following:

South Bend, Wash., Jan. 1, 1911, No. 16.

PACIFIC STATE BANK

Pay to E. McBride.....or order, \$15.00
Fifteen Dollars.
Chas. Funk.

And the said Alex McBride did, then and there knowing said writing to be forged and fraudulent, utter the same as true to one Thomas Connors, with the intent to defraud the said Thomas Connors, the said Charles Funk, the said Pacific State Bank and some other person or persons to the prosecuting attorney unknown."

This information was filed February 28, 1911. The appellant pleaded not guilty. The cause was tried on January 16, 1912. On January 18, 1912, a motion in arrest of judgment was overruled and sentence imposed. No motion for a new trial was made.

The testimony developed the following facts: That Connors and his partner, Baker, conducted a pool hall in South Bend; that, on the evening of January 14, 1911, the appellant and others were playing at cards in a room back of the pool hall; that late that night the appellant left the hall, was gone for about half an hour, and on his return presented to Connors for cashing a check for \$15, purporting to be the check of, and purporting to be signed by, one Chas. Funk; that the appellant then told Connors that he had called Funk from bed and Funk had written the check for him; that Connors cashed the check, giving the appellant a ten-dollar and a five-dollar gold piece. Funk testified that he did not write or sign the check; and that it was neither written nor signed with his knowledge or consent; that, at the time, he had no account with the bank on which the check was drawn, nor had he such an account for at least a year prior thereto. Two bankers of South Bend testified that they were familiar with the handwriting of the appellant, and that in their opinion the check in question was written by him. The appellant has made thirty-four assignments of error. They were all,

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save three, directed to the rulings of the trial court in admitting evidence, excluding evidence, and offered proof; and to the court's instructions to the jury.

When the first witness was called, and before any testimony was taken, the appellant, without withdrawing his plea of not guilty, objected to the reception of any evidence upon the ground of an alleged insufficiency of the information. The overruling of this motion is the basis of the first assignment of error. There was no error in this ruling. We have repeatedly held that a demurrer to the information, or any motion in the nature of a demurrer, may not be entertained pending a plea of not guilty, save the motion in arrest of judgment. The reasons for the rule are well stated in the following decisions: *State v. Blanchard*, 11 Wash. 116, 39 Pac. 377; *State v. Bodeckar*, 11 Wash. 417, 39 Pac. 645; *State v. Strange*, 50 Wash. 321, 97 Pac. 233; *State v. Phillips*, 65 Wash. 324, 118 Pac. 43.

The denial of the motion in arrest of judgment is also assigned as error. It was based on grounds as follows: (1) That the information does not state any offense known to the laws of this state. (2) That it does not substantially conform to the requirements of the criminal code. (3) That it charges more than one crime. (4) That the facts charged do not constitute a crime. The first and fourth grounds mean the same thing, namely, that the facts charged do not constitute a crime. Under the second and third, was presented the sole question of duplicity. The statute, Rem. & Bal. Code, § 2183, prescribing the grounds for motion in arrest, provides:

"Judgment may be arrested on the motion of the defendant for the following causes:

"(1) No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court;

"(2) That the facts as stated in the indictment or information do not constitute a crime or misdemeanor."

Section 2105 prescribes the grounds of demurrer to the indictment or information as follows:

"(1) That it does not substantially conform to the requirements of this code;

"(2) That more than one crime is charged.

"(3) That the facts charged do not constitute a crime;

"(4) That the indictment or information contains any matter which if true would constitute a defense or other legal bar to the action."

These sections make it clear that the only question properly raised by the motion in arrest was, Did the information charge a crime? The question of duplicity could only be raised by demurrer or motion to quash in the nature of a demurrer, or by motion to compel an election. It was therefore waived, as we have seen, by the failure to so demur or move prior to the plea of not guilty, and without withdrawing that plea. Such an objection comes too late after verdict. 1 Bishop, New Criminal Procedure, §§ 442, 443; *Territory v. Heywood*, 2 Wash. Ter. 180, 2 Pac. 189; *State v. Snider*, 32 Wash. 299, 73 Pac. 355.

Manifestly, therefore, the only question presented by the motion in arrest was, Did the information charge a crime sufficiently to support the verdict? We are convinced that the information contains but one count, and charges only one crime, namely, forgery in the first degree. The statute under which forgery in the first degree may be charged is contained in two sections. Rem. & Bal. Code, § 2583 declares:

"Every person who, with intent to defraud, shall forge any writing or instrument . . . or any request for the payment of money or delivery of property or any assurance of money or property . . . shall be guilty of forgery in the first degree"

Section 2587 is as follows:

"Every person who, knowing the same to be forged or altered, and with intent to defraud, shall utter, offer, dispose of or put off as true, or have in his possession with intent

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so to utter, offer, dispose of, or put off any forged writing, instrument or other thing, the false making, forging or altering of which is punishable as forgery, shall be guilty of forgery in the same degree as if he had forged the same."

It is obvious that the same crime may be committed in either of the two ways; by actually forging with intent to defraud, or by uttering, offering, disposing of, or putting out as true with intent to defraud. It is equally plain that the one crime may be committed by the same person in both of these ways, when the acts are done with reference to the same instrument and in the same transaction. While the two modes of commission are set out in separate sections, the degree of the crime when committed in the manner set out in § 2587 can only be ascertained by a reference to § 2583, or the other sections defining the degrees of forgery by the primary act of commission. Section 2587 is, therefore, not an independent provision, but must be read and construed in connection with some other section, according to the degree of forgery charged. In this instance, it must be read in connection with § 2583 defining forgery in the first degree. The effect is the same as if the provisions of § 2587 were repeated as a part of each section defining forgery by the primary act. When so considered it is clear that the information here involved charges but the one crime, and charges its commission in both of the statutory ways as a part of the one connected transaction continuous in point of time, as shown by the words "then and there," and that the words "with intent to defraud" relate to both of the acts of commission preceding them and alleged conjunctively. The statute, as we construe it and as it must be construed to be intelligible, thus leaves the decisions of this court as applicable now as they were under the old statute (Bal. Code, § 7128), which included both modes of commission in the same section. The guilt of forgery attaches to both or either of these acts; and when both are committed in reference to the same instrument, but one forgery is committed. Since both acts may be proved

as establishing the same crime, both may be included in the same indictment or information in charging the same crime. One or all of the series of acts constituting the crime may be charged in the same indictment and constitutes but one offense. *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873; *State v. Adams*, 41 Wash. 552, 83 Pac. 1108; *State v. Ray*, 62 Wash. 582, 114 Pac. 439; *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989; 1 Wharton, Criminal Law (10th ed.), § 727; Wharton, Criminal Pleadings (9th ed.), § 251.

The same crime may be charged in any or all of the ways not repugnant to each other. *State v. Justus*, 86 Kan. 848, 122 Pac. 877; *State v. Mitton*, 37 Mont. 366, 96 Pac. 926, 127 Am. St. 732.

The appellant offered to prove, that there was a poker game going on upon the premises of Baker & Connors when the check was cashed; that the game was maintained by that firm and conducted by Connors; that the appellant had lost money in the game and left for the purpose of getting more money to continue his play; that he came back with the check and cashed it and bought poker chips with the proceeds; that the game was later raided by the sheriff, and the participants pleaded guilty to a misdemeanor and paid fines. The refusal to permit this proof is assigned as error. The offer related to matters wholly immaterial, save the admission that the check was cashed. It was a request for the payment of money, and money was actually paid upon it. The act falls directly within the statutory definition of the crime. The crime was complete when he forged and passed the check for money. What he did with the money was wholly immaterial. It is no defense that he paid it out for an illegal purpose or consideration. *Dunn v. People*, 4 Colo. 126; *Ex parte Warford*, 3 Okl. Cr. 381, 106 Pac. 559; *People v. Collins*, 9 Cal. App. 622, 99 Pac. 1109.

The several assignments of error relating to the exclusion of evidence, save two, went to the same matter as this offer,

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and are sufficiently disposed of by what we have said. The two exceptions are as follows. The witness Funk was asked if, at the time of the forgery, he was not indebted to the appellant in a sum of at least \$20. There was no error in the court's refusal to permit an answer. A debt does not authorize or excuse the forgery of the debtor's name by the creditor, even to raise money to pay the debt. *Curtis v. State*, 118 Ala. 125, 24 South. 111; *Claiborne v. State*, 51 Ark. 88, 9 S. W. 851; *Plemons v. State*, 44 Tex. Cr. 555, 72 S. W. 854.

The same witness was asked whether he would have paid the check if it had been presented to him by any bank or person who held it legitimately. The court was clearly right in sustaining the objection to this question. The matter was immaterial. It affected neither the appellant's act nor his intention in committing it.

Many assignments of error are based upon the instructions. No sufficient exceptions, however, were taken to the instructions. The exceptions were merely filed with the clerk after the verdict was returned. There is nothing in the record indicating that they were ever in any manner called to the attention of the trial court. There is nothing to indicate that they were stated to the trial judge and noted in the minutes or embodied in the record by the stenographer taking the record. We have repeatedly held that the mere filing of the exceptions is insufficient. *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202; *Gerber v. Aetna Ind. Co.*, 61 Wash. 184, 112 Pac. 272; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502; *State v. Peeples*, 71 Wash. 451, 129 Pac. 108.

Moreover, no motion for a new trial was ever made. The trial court was never accorded an opportunity to review the many errors assigned.

We will, however, notice one instruction because it is urged that it violated the constitutional inhibition against comment upon the evidence, and was of such a fundamental character as to constitute ground for reversal without the reservation

of any exception. The court instructed the jury to the effect that, if it was satisfied beyond a reasonable doubt that the check was a forgery and that the defendant had it in his possession and obtained money upon it from Connors, then the possession raised a presumption of guilt, unless rebutted. This was error. Possession of the instrument was a mere circumstance. Its weight was for the jury. *State v. Hatfield*, 66 Wash. 9, 118 Pac. 893, 38 L. R. A. (N. S.) 609.

The instruction, however, was not a comment upon the evidence. It assumed no fact. It merely misstated the law. It violated no positive statute or constitutional provision. The error, therefore, was not of such fundamental character that it could not be waived. It is not within the rule touching the misconduct of a juror, announced in *State v. Bennett*, 71 Wash. 673, 129 Pac. 409. The failure to properly except to the instruction waived the error.

There was ample evidence to sustain the verdict. The judgment is affirmed.

CROW, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10704. Department One. March 8, 1913.]

HARTWELL SAMUEL DICUS *et al.*, Respondents, v. GEORGE MAJOR *et al.*, Appellants.¹

EJECTMENT—SUPERIOR TITLE—BURDEN OF PROOF—OUSTER. In ejectment, proof that plaintiff was in peaceable exclusive possession and was forcibly ousted by the defendants raises a presumption of superior title, and casts the burden of proof upon the defendants.

EJECTMENT—EVIDENCE—SUFFICIENCY. In ejectment to determine a disputed boundary line, plaintiff's *prima facie* case of superior title by reason of prior possession, supported by the fact that the adjoining owners had agreed upon the location and platted to the line claimed, is not overcome by proof that city officials had fixed the line four feet therefrom, where there was no evidence of the methods followed in the surveys made to determine the location.

¹Reported in 130 Pac. 474.

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Appeal from a judgment of the superior court for King county, Tallman, J., entered April 27, 1912, upon findings in favor of the plaintiffs, in an action of ejectment tried to the court. Affirmed.

Douglas, Lane & Douglas, for appellants.

Murphy & Wall, for respondents.

PARKER, J.— This is an action to recover possession of a strip of land about four feet wide and 133 feet long, lying along the common boundary line of two lots in different additions to the city of Seattle, which the plaintiffs claim they have been unlawfully dispossessed of by the defendants. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiffs, from which the defendants have appealed.

This is, in substance, a boundary dispute, the question being, where upon the ground is the common boundary line of the adjoining lots of the respective parties. Respondents are the owners of fractional block 16, consisting of a single lot, in Washington addition to the city of Seattle, which addition and lot are bounded upon the south by the line dividing the north and south halves of section 17, township 25 north, range 4 east. Appellants are the owners of lot 1, in block 31, of Lake Union addition to the city of Seattle, which addition and lot are bounded on the north by the same half section line, the lots of the respective parties having a common boundary along their entire length of 133 feet. Appellants insist that this line is some four feet to the north of where respondents claim it to be.

In March, 1883, the owners of land in the south half of the section, having no title to the adjoining land in the north half, surveyed and platted their land into lots, blocks, and streets, and caused the plat thereof, called Lake Union addition, to be duly recorded in the office of the auditor for King county. It is plain from this plat that they intended to plat all of their land up to the half section line, and that that line

should be the northern boundary of their addition. Not only was this land platted upon paper, but it was actually surveyed and staked upon the ground; the northern boundary being plainly marked by stakes at block corners, at least one of which stakes is still standing where it was originally placed at the northeast corner of appellants' lot one. While it is plain that this north boundary line of the addition was then marked by the owners' survey thereof as the half section line, it is not shown in what manner it was then ascertained to be such half section line.

Very soon thereafter, the owners of land in the north half of the section bordering upon this line surveyed and platted their land into lots, blocks, and streets, and caused the plat thereof, called Washington addition, to be recorded in the office of the auditor for King county. In surveying and platting this addition upon the ground, the owners conformed to the platting of Lake Union addition as to size of blocks and width of streets, and adopted the north boundary line of that addition as surveyed and staked upon the ground as the south boundary line of Washington addition. Since then there have been some fences constructed on the line thus marked upon the ground by lot owners other than the owners of the lots here involved, upon the assumption that that was the correct common boundary line of the two additions.

It appears that no doubt or controversy arose between owners of property along this line as to its correct location until within the last few years, when surveys made by the city engineering department indicated that the half section line was not as originally marked upon the ground in the survey of these additions, but that it was some four feet to the north thereof as now claimed by appellants; but, as in the case of the original survey of the additions, we have no evidence in this record as to the manner in which the city determined the location of this half section line. Whether the line was determined by either survey in the proper manner according to the legal method of subdividing sections in order to deter-

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mine the correct lines of legal subdivisions, we are not informed.

Respondents became the owners of block 16, of Washington addition, in July, 1907. Soon thereafter they improved this block by building a dwelling house thereon and improving their lawn adjacent to their dwelling, clear up to the common boundary line of the additions as originally surveyed and marked upon the ground by the stakes, one of which, as we have noticed, is still standing as marking the northeast corner of appellants' lot and the southeast corner of respondents' lot. Respondents thus continued in peaceable and exclusive possession of their lot as originally marked upon the ground, until March 10, 1911, when they were forcibly ousted of their possession of the strip here involved. Very soon thereafter, respondents commenced this action to recover possession of the land they had been thus dispossessed of.

Counsel for appellants, seeking at the outset to avoid the burden of proof and keep it upon respondents, invoke the general rule that a plaintiff seeking to recover possession of land must do so upon the strength of his own title and not upon the weakness of that of his adversary. Passing for the moment the question of the superiority of the respective paper titles of the parties, let us see where the burden of proof would rest. We assume that neither of the parties has acquired title against all the world by adverse possession; but it by no means follows that respondents have not superior title to that of appellants, viewed from the standpoint of possession alone. We have seen that respondents were in peaceable, exclusive possession of the land in controversy when they were forcibly ousted of their possession by appellants. The law seems to be well settled that, in such cases, the party so ousted, suing to recover possession, makes a *prima facie* case entitling him to so recover when he has shown that he was in peaceable, exclusive possession, and was forcibly ousted therefrom by the defendant. That is, he has by such a showing proven *prima facie*

that he has the superior title. In the early California case of *Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578, there was involved the sufficiency of a complaint in ejectment where the plaintiff rested his title upon his peaceable possession alone, at the time he was ousted. Sustaining this complaint as stating a cause of action, the court said:

"Possession is always *prima facie* evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser. The allegation that the plaintiff was in possession at the time of the ouster complained of, is a sufficient allegation of title to make the declaration good. The demurrer was, therefore, improperly sustained."

It is manifest that, if such a complaint states a cause of action, proof to the same extent would make it a *prima facie* case. Among the numerous decisions in harmony with this view, the following may be noted: *McLawrin v. Salmons*, 11 B. Mon. (Ky.) 96, 52 Am. Dec. 563; *Green v. Jordan*, 83 Ala. 220, 3 South. 513, 3 Am. St. 711; *Administrator of Jones v. Nunn*, 12 Ga. 469; *Ashmead v. Wilson*, 22 Fla. 255.

In the text of 15 Cyc. 129, the rule is stated thus:

"A prior possession creates a presumption of title which entitles plaintiff to recover against a naked trespasser. And this presumption can only be rebutted or overcome by showing title in defendant, or an outstanding title in a third party, or that plaintiff's title was subordinate and permissive, or that the action is barred by the statute of limitations."

See note in *Hancock v. McAvoy* (Pa.), 18 L. R. A. 784.

Supposing, now, that all parties had rested with the evidence showing these facts of possession and ouster, it is plain that respondents would have been entitled to judgment for recovery of the land. This being true, it follows that thereupon the burden of proof shifted to appellants, and it was for them to show a superior title, independent of possession of either party. Have they then maintained this burden of proof to the extent that they are entitled to retain possession? We are constrained to hold to the contrary. It is true that the evidence introduced of the city surveys is of

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some weight, tending to show the location of the half section line as claimed by appellants. But we regard the surveys made by the owners of the respective additions establishing the common boundary, as they plainly intended on the half section line, of at least equal weight as evidence showing the true location of that line. It is manifest that neither of these is very cogent or convincing as to the true location of the half section line, because we have no evidence as to the methods followed in either survey in determining the location of the half section line. As to whether that line was determined by a proper legal subdivision of the section, we are wholly in the dark in both cases. It seems clear to us that appellants have not overcome the *prima facie* case made by respondents by their showing of the fact that they were in peaceable possession and were forcibly ousted by appellants. This, we think, turns the scale in favor of respondents and entitles them to recover.

The judgment is affirmed.

CROW, C. J., CHADWICK, GOSE, and MOUNT, JJ., concur.

[No. 10963. Department One. March 8, 1913.]

SEATTLE NATIONAL BANK, *Respondent*, v. GEORGE E.
DICKINSON *et al.*, *Appellants*.¹

EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—"DATE OF NOTICE." Where a notice to creditors, dated September 16, required creditors to present claims within one year after the "first publication" of the notice, which was September 17, and was indorsed at the foot of the notice, the date of the notice is the date of its first publication, and it complies with Rem. & Bal. Code, § 1470, requiring presentation of claims within "one year after the date of such notice."

SAME—NOTICE TO CREDITORS—ORDER FOR PUBLICATION. Rem. & Bal. Code, § 1470, providing that notice to creditors shall be published as often as the court shall deem necessary, not less than once a week

¹Reported in 130 Pac. 372.

for four successive weeks, does not require an order of court as a condition precedent to the first publication, but an order approving the notice may be taken any time before final settlement.

SAME—NOTICE TO CREDITORS—PRESENTATION. The act of going to the place of business of the executors, named in the notice to creditors, with intent to present a claim, is not a presentation of the claim, although the office was closed and the executor temporarily absent, in view of Rem. & Bal. Code, § 1474, requiring the executor to indorse his acceptance or rejection on the notice, and to notify the creditor, and § 1475, providing that it shall be filed in court.

SAME—NOTICE TO CREDITORS—WAIVER. An executor cannot waive the statute requiring claims to be presented, nor bind the estate by promising to pay an unpresented claim or by making payments thereon, in view of Rem. & Bal. Code, § 1472, providing that claims not presented within one year shall be barred, and § 1479, providing that no action shall be maintained thereon unless the claim shall have been first presented.

SAME—CONTESTING CLAIMS—ESTOPPEL. Executors who are sole devisees and legatees are not estopped to resist a claim that was not presented within one year, by their promise to pay it and the making of small payments thereon, where the claimant did not rely upon the promise but sought and failed to present his claim in the legal way, and other creditors might be adversely affected.

Appeal from a judgment of the superior court for King county, Myers, J., entered May 6, 1912, upon findings in favor of the plaintiff, in an action on a claim against an estate. Reversed.

C. H. Winders, for appellants.

Bausman & Kelleher, for respondent.

GOSE, J.—This suit was brought against the executors of the estate of George W. Dickinson to recover upon a rejected claim. The executors have appealed from an adverse judgment.

The notice to creditors called for the presentation of claims to the executors at room 337, Burke building, in the city of Seattle, "within one year after the *first publication*" of the notice. The notice was dated September 16, 1909, and indorsed at the foot "first publication September 17, 1909."

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The place of business named in the notice was used as an office by the Pacific Engineering Company, a corporation, and by the executors. The statute, Rem. & Bal. Code, § 1470, provides that the notice to creditors shall require a presentation of the claim "within one year after the date of such notice." The date of the notice is the date of its first publication. This is the clear meaning of the statute. The notice in this respect complies with the law.

Section 1470 further provides that every executor or administrator shall, "immediately after his appointment," cause to be published a notice to creditors, and "such notice shall be published as often as the court shall deem necessary, but not less than once a week for four successive weeks." The notice was published five consecutive weeks, beginning on the 17th day of September, 1909. There was no order of the court fixing the number of publications, until the 20th day of September, three days after the date of the first publication. An order was then entered, directing that the notice be published "at least once a week for four consecutive weeks." On the 16th day of September, 1910, an order was entered reciting that the notice had been published four weeks successively, commencing on the 17th day of September, 1909, and ending on the 15th day of October following, and adjudging that due and legal notice had been given, and that the time for the presentation of claims against the estate would expire on the following day.

The contention of the respondent, that the words of the statute "as often as the court shall deem necessary," means that the order of the court determining the number of publications is a condition precedent to the publication of the notice, is not warranted by the language of the statute as an entirety. The notice must be published "as often as the court shall deem necessary," and not less than once a week for four successive weeks. This order may be taken at any time before final settlement of the estate. We have held that the publication of the notice by an executor of a non-

intervention will may precede the adjudication of solvency. *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1027.

The respondent, in support of its contention, has cited *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064. The California statute construed in that case provided that the notice "must be published as often as the judge or court shall direct," etc. The court said that, without the order, there can be no legal period of publication, and no authority for publishing, and that until the judge or court "acts it cannot be known whether the period of publication will exceed the statutory minimum or not." We think that the authority for publishing the notice comes from the statute and not from the order of the court. It is true that it cannot be known in advance of the order how many publications the court may deem necessary. This fact, however, does not render ineffectual a publication which has run the minimum period required by the statute and has been approved by the court. The object of the statute is notice, and as this court has said in construing the factory act, "notice is notice." When the notice has been published the minimum period provided by the statute without an order of the court fixing the number of publications, the court may formally approve its sufficiency, or direct a republication for such time as in its discretion it may deem necessary. This burden is, of course, assumed by an executor or administrator who publishes the notice in advance of an order fixing the period of publication.

The court found that the claim was duly presented to the executors on the 3d day of September, 1910, and several times thereafter, the last presentation being on or about the first day of October, 1910. This is more a conclusion of law than of fact. The finding is erroneous. There is evidence that the respondent's attorney took the claim to the office designated in the notice on the 3d day of September, 1910, and two or three times thereafter, before the first day of October; that he found the office closed, and that he finally left the claim with an employee in the office on the 5th day of Oc-

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tober. There is also evidence to the effect that the office was kept open continuously; that one of the executors was in Seattle the greater part of the month of September, 1909; that his headquarters were at the office; that the Pacific Engineering Company, a corporation of which one of the executors was an officer, had its office at the place designated in the notice, and that the secretary of the corporation with whom the claim was finally left made the office his headquarters.

There was no presentation of the claim within one year after the first publication of the notice. It is not pretended that the claim was left at the office designated in the notice within the year. Rem. & Bal. Code, § 1474, provides that, when a claim properly verified has been presented to the executor or administrator, he shall indorse thereon his allowance or rejection, with the day and date thereof; and that, if he rejects it, he shall notify the claimant forthwith of the rejection. Section 1475 provides that, after a claim has been allowed by the executor or administrator and judge, it shall be filed in court. The mere physical act of going to the place of business of the executors named in the notice, with an intention to present a claim, is not a presentation. Nor does the temporary absence of the executor from the place named in the notice relieve a claimant of the duty to present his claim as a condition precedent to the maintenance of a suit to enforce liability upon it. *Walker v. Cheever*, 39 N. H. 420.

Respondent has cited *Roddan v. Doane*, 92 Cal. 555, 28 Pac. 604. In that case the notice to creditors required them to present their claims to the administratrix at the office of E. W. McGraw, California Street, San Francisco. The plaintiff went to the office indicated and, the administratrix not being present, left his claim for her and took a receipt for it signed by McGraw through his clerk. The court held that "the claim was presented when left at the office." This view does not strengthen the respondent's case.

The testimony shows that the executors promised to pay the notes evidenced by the claim, and that they made small payments upon each of the several notes early in January, 1910. These payments, however, we find were not made from funds belonging to the estate, but from money loaned to the executors by their mother out of money which she had received upon a policy upon the life of her husband, the testator, in which she was named as the beneficiary, and from the funds of the Pacific Engineering Company, the principals upon the note, the testator having indorsed it before delivery. It is argued that the promise of the executors to pay the notes, and the payments to which reference has been made, operated as a waiver of the right to demand a presentation of the claim in accordance with the statute. Rem. & Bal. Code, § 1472, provides: "If a claim be not presented within one year after the first publication of the notice, it shall be barred." Section 1473 provides the manner of verifying claims. Section 1479 provides: "No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator." This section is mandatory. *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395; *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482.

In the *Ward* case, we said:

"The general rule is that an executor is a trustee for the heirs, and in no sense stands in the shoes of the deceased; that he is bound by the statute, and cannot waive, as against the heirs or devisees, any requirement of the statute. . . . Since those decisions [meaning decisions of this court] the statute must be taken as it reads, and the presentation is a fact essential to the cause of action as much as the instrument sued on."

The respondent has cited, among other cases in support of this contention, *Seymour v. Goodwin*, 68 N. J. Eq. 189, 59 Atl. 93. It holds that the provision of the statute requiring the presentation of verified claims was intended primarily for

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the protection of the executor or administrator, and that statutory provisions for the benefit of private or personal rights, and not affecting public rights or policy, may in general be waived. This is in direct conflict with the *Ward* case, where we said, "The statute is designed for the protection of estates and to bar a recovery."

The respondent invokes the doctrine of estoppel. The basis of this claim is that the executors are the sole devisees and legatees. There are two reasons why this contention is not sound; (1) the claimant did not rely upon the promise, but sought and failed to present his claim in a legal way; and (2) the executors cannot, by any promise of their own, estop creditors who have properly presented their claims for allowance and whose rights might be adversely affected.

The judgment is reversed, with directions to dismiss the action.

CROW, C. J., MOUNT, CHADWICK, and PARKER, JJ., concur.

[No. 11038. Department Two. March 8, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Thomas Short, Mayor, et al., Plaintiff, v. C. W. CLAUSEN, State Auditor, Respondent.*¹

ELECTION—BALLOTS—MAJORITY—THREE-FIFTHS OF QUALIFIED VOTERS—REJECTED BALLOTS. Under Rem. & Bal. Code, § 8006, requiring an affirmative vote in a municipal bond election, by three-fifths of the qualified voters voting at the election, ballots improperly cast or rejected are not to be counted in determining the total vote cast (CROW, C. J., dissenting).

Application filed in the supreme court February 17, 1913, for a writ of mandate to compel the state auditor to issue a warrant. Granted.

¹Reported in 130 Pac. 479.

F. W. Greenman, for relators.

The Attorney General and *R. E. Campbell, Assistant*, for respondent.

MORRIS, J.—Relators, as officials of the town of Milton, apply for a writ of mandate to respondent, to compel the issuance of a warrant in the sum of \$5,500, in payment of water bonds purchased by the state. The warrant was refused on account of a doubt as to whether or not the bonds received the necessary three-fifths affirmative vote. In determining this question, we are called upon to decide whether ballots rejected as unintelligible or illegal should be counted in ascertaining the total number of votes cast in the submitted proposition. The language of the statute governing matters of this kind, as found in § 8006, Rem. & Bal. Code, is “and such proposition shall be adopted and assented to by three-fifths of the qualified voters of the said city or town voting at said election.”

We have found some conflict in the authorities, but a careful examination convinces us that the decided weight of authority is to the effect that ballots improperly cast, or rejected because of illegality or unintelligibility, cannot be counted in determining the total vote cast. We shall not attempt to review all the authorities submitted to us, nor discuss the various reasons advanced by those courts reaching a different conclusion from the one we adopt. One of the latest cases upon a like question is *Town of Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565, upon which respondent places strong reliance. This was a county seat removal case, and the requirement of the statute was “a majority of all votes cast.” It was held that, under the peculiar language of this requirement, all ballots, whether defective or not, should be counted in ascertaining this majority. The court in so holding reviews many cases and distinguishes its statute from a requirement reading, “If a majority of said electors shall ratify the same,” as construed in *In re Denny*, 156 Ind. 104, 59 N. E. 359, 51

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L. R. A. 722, or "whenever a majority of the electors voting shall so determine," as in *People v. Town of Berkeley*, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838, and *People v. Brown*, 11 Ill. 478, or "a majority of the legal voters;" as in *State v. Winkelmeier*, 35 Mo. 103, or "If a majority of the electors qualified to vote . . . voting thereon shall approve," as in *Bott v. Secretary of State*, 62 N. J. L. 107, 40 Atl. 740; and seems to agree that, in the face of such requirements, those cases state the correct rule in holding that only those ballots entitled by law to be counted for or against the proposition, can be counted in determining the required majority. The New Jersey court, in the last cited case, also recognizes such a distinction, and says:

"To sustain the contention that, in the determination of the board of state canvassers, the number of names on the poll books, which included the votes given for and against each proposed amendment, as well as the number of ballots rejected, should be considered in ascertaining the majority, *Slingerland v. Norton* (Minn.), 61 N. W. 322, and *Smith v. Board of Commissioners of Renville County*, 65 N. W. 956, were cited. Those decisions were made upon a statute submitting to an election the question of the removal of county seats, which provided that, if fifty-five per cent. of the votes cast at such election shall be in favor of changing the county seat to the place named the change shall be made. The court, on a construction of the words, 'votes cast,' held that the majority was to be ascertained from all the ballots that were cast at the election, although some of the ballots could not be deciphered, or counted either for or against the proposed change of the county seat. Decisions of which the cases cited are types have no relevancy to the construction of our constitution. The constitutional provision does not require a majority of the voters who are admitted as such at the election and who in fact exercise or attempt to exercise the elective franchise. The certificate of the number of votes received by the several election boards is presumptive evidence that the persons by whom they were cast were qualified voters. But that concession does not dispose of this question. The constitution requires that the approval and ratification of any amendment shall be by a majority of electors who are not

only qualified to vote, but who did actually vote upon such amendment—that is, qualified voters whose ballots were entitled by law to be counted in declaring the result of the election either for or against the amendment. Though a qualified voter succeeds in getting his name on the poll list, and a ballot in the ballot box, he is not a voter voting on the amendments unless his ballot is such as is prescribed by law and conforms to the general law regulating elections. The act contains no provision for the certificate and return of the ballots that were rejected, nor does it provide for an inquiry, either before the county boards of election or before the board of state canvassers with respect to the grounds upon which votes have been rejected, nor are either of these boards empowered to embody in their official action any results other than such as are exhibited by the official statements produced before them. The ballots returned as rejected must be taken to have been properly rejected, and consequently are to be excluded from the computation of the votes cast for or against the amendments. Such ballots are simply nullities.”

Referring now to the language of our statute requiring an affirmative vote by “three-fifths of the qualified voters . . . voting at said election,” it is apparent, we think, that such language is within the rule of the *Bott* and other cases above cited, rather than within that of the *Eufaula* case. In fact, there is little if any distinction between the language in the *Bott* case, “the electors qualified to vote . . . voting thereon,” which the *Eufaula* case says calls for a different rule than the one it announces, and the language of our statute “the qualified voters . . . voting at said election.” So that it may almost be said that the *Eufaula* case, after reviewing a vast number of authorities, is authority for our holding that, under language such as ours, illegal or rejected ballots shall not be counted. Respondent also relies upon *State ex rel. Hocknell v. Roper*, 46 Neb. 724, 61 N. W. 753; *Id.*, 46 Neb. 730, 65 N. W. 802, another county seat removal case, where under the provision “any place receiving three-fifths of all the votes cast shall become and remain the county seat,” it was held that void and unintelligible bal-

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lots should be counted in determining the result. The same case and question, we find, were subsequently submitted to the court in *Id.*, 47 Neb. 417, 66 N. W. 539, and upon a re-examination the court was convinced of its error in so ruling, and then held that rejected and unintelligible ballots could not be considered in determining the result. *Smith v. Board of Commissioners of Renville County*, 64 Minn. 16, 65 N. W. 956, is also cited by respondent. This was also a county seat removal case. The statute provided that the proposition must receive "55 per cent of the votes cast," and it was held "votes cast" was equivalent to ballots cast, and all ballots cast, whether good or bad, should be counted. The court bases its opinion upon the evident intent of the legislature in view of all the provisions of the removal statute. The same court later on, in *Hopkins v. Duluth*, 81 Minn. 189, 88 N. W. 536, in a case involving the submission of a new municipal charter, where it was provided that the proposition must receive the affirmative vote of "four-sevenths of the qualified voters voting at such election," held that unintelligible ballots should be excluded in arriving at the result, saying in referring to these rejected ballots: "The effort of the voter in each instance to avail himself of his right of franchise amounted to nothing, and the most we can say for it is that it was a mere attempt to vote and could not be counted." The court then proceeds to distinguish this ruling from its former ruling in the county seat removal case, and defends its former ruling upon the peculiar situation presented in cases of that character calling for the announcement of such a rule. The court's distinction of the two cases must be accepted, or the latter case must be regarded as overruling the former. It will be noted that the statutory requirement considered in the latter case is in effect identical with the provision of our statute.

In *Wightman v. Village of Tecumseh*, 157 Mich. 326, 122 N. W. 122, the requirement considered was a "two-thirds vote of the electors voting upon the question." Fifty-five ballots

were rejected as illegal because of distinguishing marks, and it was held that, under this requirement, these rejected ballots could not be counted in determining whether or not the submitted proposition had received the necessary two-thirds affirmative vote. Discussing this holding, it is said:

“Complainant . . . insists that the legal electors voted these ballots, and therefore they should be counted in estimating the two-thirds vote. In other words, he insists that these votes were valid for one purpose, but void for all others. The position is untenable. The statute makes all such votes void. A void vote is of no more effect than no vote.”

A like rule is announced in *Murdoch v. Strange*, 99 Md. 89, 57 Atl. 628, where it is said: “The overwhelming weight of authority is in favor of these views.” Similar views upon like questions are found in: *Catlett v. Knoxville, S. & E. R. Co.*, 120 Tenn. 699, 112 S. W. 559; *Battle Creek Brewing Co. v. Board of Suprs. of Calhoun County*, 166 Mich. 52, 131 N. W. 160; *Attorney General v. Board of Suprs. of Genesee County*, 166 Mich. 61, 131 N. W. 163; *State ex rel. McCue, v. Blaisdell*, 18 N. D. 31, 119 N. W. 360.

It is clear, we think, in considering whether or not any like submitted proposition has received the requisite affirmative vote, that only those ballots that express the voter's choice with such clearness that the ballot can be counted either for or against the submitted proposition, can be counted in the totals. The requirement contemplates two ballots only, one affirmative and the other negative. To adopt the other rule would be to say that three ballots were contemplated. One affirmative, one negative, and the other neither affirmative nor negative, but forming a new class into which all ballots for any reason void must go. Nothing of this kind was ever contemplated by the legislature. In demanding a three-fifths affirmative vote, the essential requirement was intended to mean the affirmative votes should exceed the negative votes by one-fifth. To make the requirement read, the affirmative votes

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should exceed the negative votes, plus all other votes, by one-fifth, is to read into the statute something not there nor intended to be there.

Let the writ issue.

MAIN, ELLIS, and FULLERTON, JJ., concur.

Crow, C. J. (dissenting)—As stated in the majority opinion the statute, Rem. & Bal. Code, § 8006, requires that "such proposition shall be adopted and assented to by three-fifths of the qualified voters of the said city or town voting at said election." In other words, the mandate of the statute is that the affirmative assent of three-fifths of all qualified voters voting at the election shall be required to adopt the proposition. It is conceded that the proposition did not receive the requisite three-fifths, unless the electors who cast the so-called unintelligible ballots and who were qualified voters, are to be ignored, or held not to have voted at the election. I am of the opinion that, in contemplation of the statute, they did vote at the election, that the proposition failed to carry, and that the writ should not issue. I therefore dissent.

[No. 10700. Department One. March 11, 1913.]

ARCHITECTURAL DECORATING COMPANY, *Respondent*, v.
GUSTAF NICKLASON *et al.*, *Defendants*, ROSE
THEATRE COMPANY, *Appellant*.¹

APPEAL—JUDGMENT—CONCLUSIVENESS. Where an appeal, brought up on a short record, was affirmed, judgment entered as directed cannot be attacked by appellant on motion to vacate upon a showing of facts which appellant failed to present to the supreme court on the former appeal.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered July 29, 1912, dismissing a petition to vacate a judgment. Affirmed.

¹Reported in 130 Pac. 506.

Wilson R. Gay and *E. J. Adams*, for appellant.

John W. Roberts, for respondent.

PER CURIAM.—This case is no stranger here. *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177. It was brought to this court upon “a short record containing only the findings of fact, conclusions of law, decree, and two exhibits.” The only question decided was whether the findings supported the decree. That question was decided against the Rose Theatre Company, and the case was remanded with instructions to enter a decree in favor of the present respondent. Thereafter appellant filed a petition, praying for an order of the trial court vacating the judgment entered under the direction of this court. The petition was dismissed by the trial judge, and the case is brought here on appeal.

Appellant, having been a party to the former appeal and having then failed to bring the record, showing the facts it now sets up to the attention of the court, and not having asked leave of this court to attack the judgment which was entered under our direction, cannot be heard, either by way of petition or in an independent action, under the authority of the following decisions: *Kath v. Brown*, 69 Wash. 306, 124 Pac. 900; *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. 1084; *Kelley v. Sakai*, ante p. 364, 130 Pac. 503; *Cochrane v. Van de Vanter*, 13 Wash. 323, 43 Pac. 42; *State ex rel. Wolferman v. Superior Court*, 8 Wash. 591, 36 Pac. 443. Affirmed.

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[No. 10860. Department One. March 11, 1913.]

F. BOGART, *Respondent*, v. PITCHLESS LUMBER COMPANY,
Appellant.¹

DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS—EVIDENCE—ADMISSIBILITY. Upon breach of a contract to employ plaintiff to log defendant's timber, the plaintiff may recover his prospective profits, to be ascertained by the best evidence obtainable, such as the estimates of qualified timber men, acquainted with local conditions, as to the cost of performing particular parts of the work, although the estimates do not furnish a measure of mathematical nicety.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered March 4, 1912, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

Connor & Akins, for appellant.

H. W. Arnold, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover damages for the breach of a contract.

Defendant was the owner of a certain body of saw timber, and plaintiff engaged to remove it. It is unnecessary to go into the detail of the contract. Plaintiff entered upon the performance of his undertaking, but was ordered by the defendant to cease work pending a season of possible high water in the Columbia river.

Thereafter and after all danger from high water had passed, defendant notified plaintiff it would not log its timber. Plaintiff was at all times ready and willing to perform, but performance was refused by defendant. The court allowed a recovery of \$408, being 34c per thousand feet board measure, which the court found to be the prospective profits on 1,200,000 feet. From a judgment for this amount, defendant has appealed.

¹Reported in 130 Pac. 490.

The case comes here upon exceptions to the findings of fact. There is evidence to sustain the finding of the court that a contract was made and breached by the defendant, and the only question open is whether the court properly measured the damages. Plaintiff was to receive \$4.50 per M. A number of witnesses, most of them being qualified as competent timber men and who knew the local conditions, were asked how much it would cost to log the land, or how much it would cost to perform particular parts of the work, as felling, bucking, and swamping. From all of this evidence the court found that plaintiff might have made a profit. This method of arriving at the amount to be assessed as damages is challenged by appellant.

It is true, as contended, that "what one thinks and calculates that he could have made a certain sum, for a breach of contract, is not evidence on the question of damages." Nor is the subject one that is usually determined by opinion or expert testimony, based upon a hypothetical question; for, as is aptly said, as many witnesses might be found to swear that there would be no profits as might swear that there would be profits. This would tend to speculation, while the theory upon which prospective profits are allowed is that they can be estimated with reasonable certainty. Such profits do not have to be accurately known. They are to be determined from a consideration of all of the tangible evidence upon the subject. *Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174. This court is committed to the doctrine of allowing prospective profits. In *Watson v. Grays Harbor Brick Co.*, 3 Wash. 283, 28 Pac. 527, it was held that:

"When one contracts to perform work for another at a stipulated price, and is prevented by him from entering upon the performance, the measure of damages is the difference between the cost of performing the work by the party agreeing to do it and the price agreed to be paid for it."

See, also, *Skagit R. & Lumber Co. v. Cole*, 2 Wash. 57, 25

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Pac. 1077; *Graham v. McCoy*, 17 Wash. 68, 48 Pac. 780, 49 Pac. 235.

To ascertain the cost of performing any contract so as to arrive at the measure laid down in the above cases, resort must of necessity be had to the estimates of those who are competent to pass judgment and who have knowledge of the particular conditions.

"The trees were there from which the logs, spars and piles could be manufactured; and at the time of the breaches there was the benefit of past experience—the known results of previous efforts in carrying on the work—from which to form an estimate of what could have been done thereafter had the supplies been furnished." *Skagit R. & Lumber Co. v. Cole, supra*.

Such evidence is received upon the theory that it is the best evidence obtainable. Consequently men who know conditions, and have dealt in commodities, lands, or manufactured goods, are constantly called upon to advise courts and juries as to cost and value. 5 Ency. Evidence, 535, 569; Jones, Evidence, § 375 *et seq.*; Wigmore, Evidence, §§ 558, 713, 721.

Whether a witness is competent to express an opinion depends largely upon the discretion and sound judgment of the trial judge. No hard and fast rule can be laid down in such cases. The object of every trial is to elicit the truth, and whether the opinion is to be based upon personal knowledge or upon hypothetical questions must necessarily vary as the cases present themselves, the court keeping in mind at all times the rule of best evidence. In this case, the witnesses had personal knowledge and estimated the cost of getting out the logs. Appellant says respondent should have shown his profit in some other way. No other way is pointed out, nor do we know of a better way than to take the difference between the cost and the price to be paid. The cases cited and relied on by appellant all follow the general rule, and proof of profits was denied because of some element, added or omitted, which

made the question one of speculation or conjecture, rather than one of reasonable certainty.

It is complained that there is no evidence to sustain the exact sum allowed by the trial judge. This is probably true. Damages depending on varying estimates cannot be measured with mathematical nicety. It is enough that the judgment is within the evidence. There is testimony that would sustain a larger recovery, and appellant is not injured.

Judgment affirmed.

Crow, C. J., Gose, Mount, and Parker, JJ., concur.

[No. 10389. Department Two. March 11, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. CHERRY POINT FISH COMPANY, *Appellant*.

THE STATE OF WASHINGTON, *Respondent*, v. CARLISLE FISH COMPANY, *Appellant*.¹

CRIMINAL LAW—APPEAL—REVIEW. The supreme court will not disturb a conviction that is sustained by substantial evidence, even if there is a preponderance of evidence against it.

FISH—FISHING REGULATIONS—VIOLATION OF STATUTE—ELEMENTS OF OFFENSE—INTENT. Intent is not an essential element of the offense of unlawful fishing, in violation of Rem. & Bal. Code, § 5186, requiring all fishing appliances to be closed in a certain way at specified hours each week; and the jury is properly instructed that they may convict regardless of the intent or wilfulness of the act of the accused, it being sufficient to show a failure to close the traps in the manner required by law.

SAME—REGULATIONS — “TAUT” APRONS — “EFFECTUALLY” CLOSING TRAPS. The provisions in Rem. & Bal. Code, § 5186, prohibiting salmon fishing at certain hours each week, and requiring nets and traps to be closed by an apron across the entrance, fastened by rings on a “taut” wire, so as to “effectually prevent” any salmon from entering, is to be construed in its ordinary sense; “taut” not meaning merely “substantially and practically tight;” and “effectually preventing” not meaning “substantially and practically” preventing fish from entering; and an instruction that the accused could not

¹Reported in 130 Pac. 499.

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be found guilty if they had closed their traps by the appliances required by law, drawn as "taut or tight as it could reasonably be drawn consistent with . . . raising and lowering the same," is as favorable to the accused as the construction warrants.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—COMMENT ON FACTS. The statement of general rules governing the weight and credibility to be given to expert testimony, is not an unlawful comment on the evidence.

SAME—TRIAL—REQUESTED INSTRUCTIONS. It is not error to refuse requested instructions that are covered in the general charge.

FISH—FISHING APPLIANCES—VIOLATIONS—EVIDENCE—REBUTTAL. In a prosecution for unlawful fishing, where the accused sought to show that openings in the aprons to their traps were the inevitable result of the plan required by law, and not to faulty construction, it is proper in rebuttal to show that other aprons in the vicinity constructed on the same plans remained in place and effectually closed the traps as required by law.

SAME—EVIDENCE—RELEVANCY. In a prosecution for violation of the fishing law (Rem. & Bal. Code, § 5186), requiring traps and nets to be closed at certain hours with an apron on a "taut" wire, evidence that when examined a week previous to the time mentioned, the wire was in a slack condition, is relevant to show its condition at the time alleged.

MOUNT, J., dissents.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered December 11, 1911, upon a trial and conviction of unlawful fishing. Affirmed.

Charles A. Sather and Kerr & McCord, for appellant.

Frank W. Bixby and H. C. Thompson, for respondent.

FULLERTON, J.—The statute regulating salmon fishing in the waters of Puget Sound, in the state of Washington, among other things, provides that:

"It shall be unlawful . . . to take or fish for salmon with pound nets, fish traps, weirs or fish wheels, or other fixed appliances, . . . in any of the open waters of Puget Sound between the hours of 4 o'clock p. m., Friday and 4 o'clock a. m. Sunday, of each week of each year . . . That between 4 o'clock p. m. Friday, and 4 o'clock a. m. Sunday, of each week of each year, as above provided, all pound

nets or fish traps operated within the waters of Puget Sound shall be closed by an apron placed across the entrance to the heart of the trap or pound net, which apron shall extend from above the surface of the water to the bottom of the sound at the place where the trap is maintained and be connected securely to the piles on either side of the entrance to the heart of such trap or pound net, fastened by rings not more than four feet apart on a taut wire stretched from top to bottom of piles so as to effectually prevent any salmon from entering the heart of such trap or pound net. Any person violating any of the provisions of this section, whether or not such a violation is otherwise specifically declared to be a misdemeanor, either by neglecting to observe the requirements of this section, or by violating any of the requirements thereof shall be deemed guilty of a misdemeanor, and shall upon conviction thereof in each and every offense be subject to a fine of not less than two hundred and fifty dollars (\$250) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail not less than twenty-five days nor more than one year, or by both such fine and imprisonment." Rem. & Bal. Code, § 5186.

On September 29, 1911, the prosecuting attorney of Whatcom county filed separate informations against the appellant corporations, the Cherry Point Fish Company and the Carlisle Fish Company, charging each of them with maintaining a fish trap and fishing for salmon between the hours of four o'clock p. m. on Friday August 11, 1911, and four o'clock a. m. Sunday, August 13th, 1911. The informations were similar in form, the specific charge in each of them being that the defendant had maintained the trap by "then and there unlawfully and wilfully neglecting to close the entrance to the heart of the said fish trap . . . by then and there unlawfully and wilfully so placing the apron at the opening to the heart of said trap that space was left on the side next to the lead for the free entrance of salmon fish," during the hours in which the statute required the opening to the heart of the trap to be closed.

The defendants on being brought into court to answer to the informations, demurred thereto, which demurrers the trial

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court overruled, whereupon they entered pleas of not guilty. The parties thereupon stipulated that the causes should be consolidated for trial before a single jury as one cause, except that separate verdicts should be returned by the jury for or against each defendant. An order of consolidation was entered, and the cause tried before a single jury as stipulated. The jury returned a verdict of guilty against each of the defendants, on which a judgment was entered imposing upon them a fine of \$250. From the judgment, this appeal is prosecuted.

The appellants first assign error on the ruling of the court denying their motion for a directed verdict. It is not contended that there is not competent evidence in the record tending to support all of the material allegations of the information, but it is thought that "an examination of the testimony, both the plaintiff's witnesses and the defendants' witnesses, will convince the court beyond a reasonable doubt that there was no opening between the apron and the lead on the flood side of either of the traps in question at the times claimed," such as is alleged in the information. In response to the appellants' suggestion, we have examined the evidence, and while it has failed to convince us beyond a reasonable doubt that the apron effectually closed the hearts of the traps at the time in question, we are impressed with the idea that the jury could well have found with the appellants on the question. Indeed, we may go further and say that the evidence to our minds preponderates in favor of their contention. But, nevertheless, we have no legitimate warrant to interfere with the verdicts. There is in the record the positive evidence of three witnesses, who visited the traps on the day in question, to the effect that the aprons placed over the openings to the hearts of the traps did not effectually close them; that at the one they propelled their row boat into the heart of the trap passing through an opening between the apron and the lead, and found fish in considerable numbers within the trap; and that the other was in a similar condition, although the opening between the lead

in the apron was perhaps not quite so wide. They testify, also, to the general conditions surrounding the traps, showing, if their evidence is to be believed, a clear violation of the statutes. This, as we say, relegates the question to the jury, and renders their verdict conclusive in so far as this court is concerned; it not being our province to interfere with a verdict which is sustained by substantial evidence. *State v. Maldonado*, 21 Wash. 653, 59 Pac. 489; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Norris*, 27 Wash. 453, 67 Pac. 983; *State v. Roller*, 30 Wash. 692, 71 Pac. 718; *State v. Bailey*, 31 Wash. 89, 71 Pac. 715; *State v. Katon*, 47 Wash. 1, 91 Pac. 250; *State v. Clem*, 49 Wash. 273, 94 Pac. 1079; *State v. Gilluly*, 50 Wash. 1, 96 Pac. 512.

The court instructed the jury, in effect, that a specific intent to violate or evade the statute regulating the construction and maintenance of fish traps was not necessary to constitute an offense under the statute; but, on the contrary, if they found that the appellants were guilty of the acts of commission or omission charged against them in the informations, they could be found guilty of the offense charged therein, regardless of their purpose or intent in committing the prohibited acts. The appellants assail the instruction for a number of reasons, but we think it correct in principle. It is not here denied, of course, that, where a specific intent is required by statute to constitute an offense, such specific intent is a part of the offense and must be alleged and proven before a conviction can be had. But where the statute makes it an offense to do a particular thing, and, like the one before us, is silent concerning the intent with which the thing is done, a person commits the offense when he does the forbidden thing, even if he had no evil or wrongful intent beyond that which is implied from the doing of the prohibited act. This principle was announced by us in the case of *State v. Nicolls*, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912 B. 1088, wherein this language was used:

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"Nor does the lack of intent excuse the offense. While it is an axiom of the law that there can be no crime without criminal intent, there are many cases where the execution and enforcement of the law demand that the intent be implied; a presumption flowing from the acts of the parties. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state, where the word 'knowingly' or other apt words are not employed to indicate that knowledge is an essential element of the crime charged. In the statute before us no qualifying words are employed. One who sells, gives, or barter intoxicating liquor to an Indian or one of mixed blood, is guilty. The fact of selling being established, the law supplies the element of intent."

There are cases to the contrary, but we think the great weight of authority and the better reason supports the rule as we have announced it. *State v. Hensell*, 17 Idaho 725, 107 Pac. 67, 27 L. R. A. (N. S.) 159; *United States v. Gallant*, 177 Fed. 281; *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 62 Am. St. 800, 34 L. R. A. 784; *Commonwealth v. New York Cent. & H. R. R. Co.*, 202 Mass. 394, 88 N. E. 764, 132 Am. St. 507; *Farmer v. People*, 77 Ill. 322; *State v. Voight*, 90 N. C. 741; *State v. Goodenow*, 65 Me. 30.

The court further instructing the jury defined the meaning of the words "taut" and "effectually" used in the statute, giving to them the meaning usually accorded the words in the standard dictionaries. The appellants contend that the text of the act of the legislature from which the words are taken shows that the legislature did not use the words in their formal and technical sense, but gave to them a more liberal meaning; using the word "taut" as meaning "substantially and practically tight," and the phrase "effectually preventing" salmon from entering the heart of the trap, as meaning "substantially and practically" preventing them from so entering. But without following the argument by which the appellants seek to justify the contention, we think it not tenable. We find nothing in the text of the act that leads us to believe that the legislature intended to use the words in question in other than

their natural and accepted meanings, and we think the court did not err in so instructing the jury. But that the jury might not be misled by the language of the definitions read to them, this further instruction was given, namely:

“You are instructed that, if you find from the evidence in this case that the defendants or either of them used and maintained in the construction and maintenance of the aprons across the entrance to the hearts of the fish traps operated by them, the appliances required by the law of this state, which I have hereinbefore read to you, then I instruct you that the use and maintenance of such appliances, if it complies with the method and manner prescribed by law, amounts to a compliance with the law, and even if you should find that the appliances provided by law do not in fact effectually prevent the entrance of fish into the heart of such trap, then you are instructed that such defendant who has complied with the law cannot be found guilty of the offense charged in the information. And you are further instructed that if you find from the evidence in this case that the defendants or either of them installed and maintained the appliances required by the law of this state, which I have hereinbefore read to you, and that the wire or cable to which the apron across the entrance of the heart of the trap was attached by rings not more than four feet apart, was drawn as taut or tight as it could reasonably be drawn consistent with the proper manipulation of such apron in raising and lowering the same, then I instruct you that such defendant cannot be found guilty of the offense charged in the information herein, even though the evidence may show that notwithstanding the compliance of such defendant with the law of this state some space or opening was left between the lead and the apron by reason of the action and force of the tide, and that some fish could pass into the heart of the trap through this space or opening.”

Clearly this view of the requirements of the statute is as favorable to the appellants as a proper construction of the same warrants.

The appellants have also assigned error on the instruction of the court relating to the size of the wire cables used to hold the apron in place, contending that there was no evidence upon which to base such an instruction. But we find there was evi-

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dence touching this question ; indeed a part of the cable itself was exhibited to the jury. So in regard to the instructions concerning the testimony of the expert witnesses. The court therein stated nothing more than the general rules governing the weight and credibility to be given to such evidence, and to do so is not to charge the jury with respect to matters of fact, nor to comment thereon, within the meaning of the constitutional inhibition.

The assignments of error based on the refusal of the court to give certain requested instructions need no separate consideration. In so far as they were material they were included in the instructions given by the court, and under the practice in this state it is not error to refuse to instruct in the language and form requested, even though both be unobjectionable, it being proper under all circumstances for the court to instruct in its own language.

The witnesses Aiken, Dakin and Jones were allowed to testify in rebuttal that, on the day they visited the appellants' traps, they visited traps in the same vicinity belonging to another fishing company and found that the aprons thereon, which were constructed in the same manner that the aprons on the appellants' traps were constructed, remained in place and effectually closed the hearts of the traps. This is assigned as error, but we think it proper rebuttal testimony. The appellants had sought to show that the opening found in the aprons to their traps was the inevitable result of the plan upon which they were constructed and not to faulty construction. To rebut this testimony, it was competent for the state to show that similar traps in the same waters constructed on the same plan effectually prevented the entrance of salmon into the hearts of such traps when the aprons thereto were closed.

Finally, it is urged that the court erred in permitting a witness to testify that the wire cables supporting the apron on one of the traps were examined by him a week previous to the time mentioned in the information, and found them to be in a

slack condition and not drawn as tight as they could reasonably have been drawn. It is urged in this court that this was to admit evidence of a separate and distinct offense, in no way connected with the offense of which the appellants are accused, and hence erroneous. But the appellants mistake the effect of the testimony. As tending to show the condition of the cables at a particular time, it is competent to show their condition a reasonable time before and a reasonable time after the particular time; the admissibility of the evidence depending upon the remoteness of such time. The time to which the witness was permitted to testify was somewhat remote from the time informations alleged the offense to have been committed, but we do not think it so much so as to render its admission reversible error.

We find no substantial error in the record, and the judgment appealed from will stand affirmed.

MAIN, ELLIS, and MORRIS, JJ., concur.

MOUNT, J. (dissenting).—The defendants did not attempt to take fish within the prohibited time. They closed their traps in good faith in the manner provided by law. If that method was not effective, the fault was in the law. The trial court should have directed an acquittal. I therefore dissent.

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Opinion Per MOUNT, J.

[No. 10991. Department One. March 12, 1913.]

ISAAC BLUMAUER, *Appellant*, v. C. B. MANN *et al.*,
Respondents.¹

TAXATION—VALUATION—EQUALIZATION—NOTICE OF INCREASE. Taxpayers who appeared before the board of equalization to protest against increased valuations, pursuant to a notice to show cause, cannot thereafter object that the notice was insufficient in form.

SAME—EXCESSIVE ASSESSMENT—FRAUD. An assessment of property for taxation will not be set aside as excessive unless the evidence is clear that the board of equalization acted arbitrarily or fraudulently.

Appeal from a judgment of the superior court for Thurston county, Sheeks, J., entered December 8, 1911, dismissing an action to restrain the collection of taxes, after a trial on the merits. Affirmed.

Thomas M. Vance and *Harry L. Parr*, for appellant.

John M. Wilson, for respondents.

MOUNT, J.—This action was brought to restrain the county officers of Thurston county from collecting taxes against certain described lands belonging to the plaintiff. The action is based upon the alleged ground that, in the year 1908, the values returned by the county assessor were raised by the county board of equalization without notice to the plaintiff, and that the increased value as fixed by the county board of equalization was unjust and arbitrary. These allegations were denied. The action was tried to the court, and resulted in a judgment in favor of defendants for their costs, and denying the relief prayed for in the complaint. Plaintiff has appealed.

The appellant argues that the values of his property, as fixed by the county board of equalization in the year 1908, were increased without notice and therefore without authority

¹Reported in 130 Pac. 491.

of law, and were fixed arbitrarily and unjustly. As we read the record, a notice of intention to increase the values was sent to and received by the appellant, who appeared before the board of equalization and protested against the increase in value. It is true that some of the descriptions in this notice were of property that did not belong to the plaintiff, but it also appears that all the property which was increased in value was described in the notice. It also appears that a hearing was had and evidence taken by the board of equalization as to the value. No objections were made at that time to the form of the notice or to the sufficiency of it. The appellant appeared before the board of equalization in answer to the notice, and endeavored to prevent an increase, but his protests were denied. The object of the notice was accomplished, and plaintiff cannot now complain that the notice was insufficient. *Ladd v. Gilson*, 26 Wash. 79, 66 Pac. 126; *Edison Elec. Ill. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132.

We find no substantial evidence in the record to indicate that the board of equalization acted arbitrarily or fraudulently when it increased the values as returned by the assessor. Before an assessment can be set aside upon these grounds, the evidence must be clear to that effect. *Northern Pac. R. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178; *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912 B. 870.

The lower court therefore properly dismissed the action. Judgment affirmed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 10782. Department One. March 12, 1913.]

CLOYD MAYHEW, *Appellant*, v. YAKIMA POWER COMPANY,
Respondent.¹

ELECTRICITY—HIGH VOLTAGE WIRES—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Negligence in the maintenance of a high voltage power line along a county road, carried on cross-arms forty feet above the ground, is not shown from the fact that the line came in contact with a hay-loading derrick forty-five feet high, with a revolving arm, which was being hauled along the highway, where there was no evidence that it was usual or customary to haul such derricks along the highway.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered March 21, 1912, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries sustained through contact with electric wires on a highway. Affirmed.

J. M. Dunn and *Frank A. Luse*, for appellant.

Danson, Williams & Danson and *Luhman & Clark* (*George D. Lantz*, of counsel), for respondent.

CHADWICK, J.—Defendant is the owner of a high power transmission line in the Yakima valley. It runs parallel with and along the edge of the right-of-way of the public roads. The posts are set the usual distance apart, and the power line is run on cross-arms which are about forty feet above the ground. The voltage was very heavy, and there is evidence to sustain a finding that insulation would have been impractical if not impossible. Plaintiff, a boy of sixteen years, but well grown and strong, was employed as one of a hay stacking crew. Hay is usually stacked in the Yakima valley by means of a derrick. The one to which we shall refer was rigged in the following manner: Large timbers were set on the ground, and upon these a stack pole forty-five feet high was reared. On the top of the stack pole there was an arm

¹Reported in 130 Pac. 485.

eighteen feet long. The whole superstructure was so arranged that it would swing or revolve freely. From the end of the arm, a long cable was extended through a block and tackle. When this was pulled down it formed a loop which would reach to the ground. The ground timbers of the derrick were cut to serve the purpose of sled runners, and the structure was moved by hitching horses to it and dragging it from place to place.

At the time of the injury complained of, the derrick was being hauled along the road, and plaintiff was riding in the loop of the cable, which hung so low that it came within a short distance of the ground. The ground was sufficiently rough and uneven to jar the structure, and the mast swung around so that the wire cable came in contact with the power line, at a time when plaintiff had his foot on the ground. A circuit was thus formed, and plaintiff was severely shocked and burned. An action was brought to recover damages, and from a directed verdict plaintiff has appealed.

Negligence is alleged in this, that respondent having placed a dangerous force on the highway, it was his duty to make the highway as safe for those who had a right to travel on it as it was before. He also invokes the rule that, where people have a right to go either for business or pleasure, it is the duty of those who handle dangerous agencies to insulate or protect them so as to insure the safety of those who might come in contact with them. But it seems to us, as it did to the trial judge, that there was no negligence on the part of respondent. Negligence is an omission of duty imposed by statute or implied by law. Negligence is not presumed, but is to be proven as a fact. Nor does the law charge as negligence an act which may result in harm to another, unless the consequences of the act are such as could have been reasonably foreseen and guarded against. The duty of the respondent is accurately defined by the trial judge when taking the case from the jury. He said:

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"That duty was to put the wires high enough to leave the road safe, not for any and all travel, but for usual and ordinary travel."

In the course of his opinion he said:

"There is not any evidence, worthy evidence, tending to prove that at the time defendant built its power line hay derricks 45 feet high, including the projection of the arm above the mast, were so generally hauled over said road as to constitute ordinary and usual travel. There is evidence tending to prove that Mr. Mayhew had, as occasion required, hauled his derrick in question over the road, and that other derricks had occasionally been hauled over other roads in that part of the county, but the habit of Mr. Mayhew to haul his derrick is not a custom of the community to haul derricks and is not in my opinion, sufficient evidence upon which to submit to you the question of the existence of such a custom. There is no evidence that the other derricks occasionally hauled were 45 feet high, though there is perhaps some evidence tending to show that they were not that high. The evidence, in my opinion, not being sufficient to submit to the jury, the question whether derricks 45 feet high were so generally hauled over said road as to constitute usual and ordinary travel, the question arises: Ought the court judicially to know that derricks 45 feet high were so generally hauled over that road as to constitute usual and ordinary travel, or were so generally hauled over the roads in that vicinity as to constitute ordinary and usual travel thereon? It seems to me the court does not judicially know that fact, if it be a fact. Doubtless it is judicially known that common vehicles are ordinarily hauled on the highways. But it seems to me the court judicially knows that a derrick with a revolving arm 45 feet high is an extraordinarily high thing to haul on the highway, and while, as aforesaid, an extraordinarily high thing may be so generally hauled as to constitute ordinary travel, I do not think that derricks of the height and structure of the one in question are so generally hauled that the court judicially knows that such hauling is an ordinary use of the highway. If the court does judicially know it, it follows on elementary law that the court should so charge the jury. In my opinion, no lawyer will maintain that the court should charge the jury in this case that hauling derricks like the one in question was an ordinary use of said highway."

We can add nothing to this conclusion. It is elementary law and sustained by many adjudged cases. 15 Cyc. 471, 472; *Graves v. Washington Water Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452.

Judgment affirmed.

Crow, C. J., Gose, Mount, and Parker, JJ., concur.

[No. 10710. Department One. March 12, 1913.]

P. K. SMITH, *Respondent*, v. A. K. ADELBERG, *Appellant*.¹

BROKERS—COMMISSIONS — CONTRACT FOR EMPLOYMENT — PERFORMANCE. A broker is entitled to recover his commissions, the value of shares agreed to be given him, for finding a purchaser for 3,000 shares of stock in a corporation to be organized by the defendant, where he fully performed his agreement by finding a purchaser willing to buy the stock, but the project fell through solely because of defendant's misrepresentations as to the commissions he would make out of the enterprise, and as to the number of subscribers necessary to form the syndicate, and the value of the land.

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered May 25, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Charles D. Fullen and *Jas. G. Raley*, for appellant.

H. R. Clise and *C. K. Poe*, for respondent.

Gose, J.—This appeal involves two questions: (1) Are the findings of fact supported by the evidence, and (2) does the evidence justify the judgment as a matter of law. The material facts found are, that the appellant employed the respondent to secure subscribers to a syndicate then in process of organization, for the purpose of purchasing about 13,000 acres of land, situated in the state of Montana, at the price of \$9.50 per share; that he agreed to give

¹Reported in 130 Pac. 494.

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the respondent one hundred shares in the syndicate, or its equivalent in money, if he would secure a subscriber for three thousand shares; that he represented to the respondent that he had *bona fide* subscribers for all of the remaining shares; that he had an option to purchase the land at \$9.50 per acre; that the land was reasonably worth fourteen or fifteen dollars per acre; that, relying on these representations, the respondent introduced the appellant to one Kerry, whom they jointly induced to subscribe for the three thousand shares; that Kerry was at all times ready, willing, and able to pay for such shares; that, as an inducement to Kerry to subscribe, the appellant misrepresented the facts to the respondent and to Kerry in this, that he did not have *bona fide* subscribers for the balance of the shares, and in the further particular that he had an option on the land at \$6.50 per acre, and intended to wrongfully make a secret profit upon the purchase of the land, which fact was unknown to the respondent and Kerry; that, by reason of the fact that the appellant did not have *bona fide* subscribers for the remainder of such shares and because of the other misrepresentations set forth, the enterprise failed of consummation; that, had the appellant's representations been true, the syndicate would have been organized and Kerry would have paid for the shares which he subscribed, and that the reasonable value of one hundred shares is \$950. The conclusion of law deduced was that the respondent was entitled to a judgment against the appellant for \$950, together with his costs, and a judgment was entered accordingly.

These findings are abundantly supported by the evidence. The plan proposed was that each share of stock should represent one acre of land. The testimony shows that the appellant was to give the respondent one hundred shares of stock in a corporation to be organized by the former, or to give him its equivalent in money. The appellant represented that his commission on the basis proposed would be \$3,000, whilst the testimony shows that it would have been about

\$30,000. It further appears from the testimony that the appellant represented to the respondent that the 3,000 shares subscribed by Kerry at the instance of the respondent would complete the stock subscription, and that Kerry was ready, able, and willing to pay his subscription if the appellant's representations had been found true. The respondent had no employment other than to secure a subscription of three thousand shares. There was no arrangement whereby he was to be a party to the organization of the corporation. The duty of organizing the corporation and issuing the one hundred shares of its stock to the respondent, or paying him its equivalent in money, was devolved by the transaction upon the appellant alone. The enterprise failed of consummation because he did not have the *bona fide* subscribers which he represented to have, and because of his misrepresentations as to the commission he would make out of the enterprise and as to the value of the land. The respondent did all that he was required to do when he had procured the subscription. The enterprise failed, not because of anything the respondent failed to do, but solely in consequence of the misrepresentations of the appellant.

The appellant relies upon the recent case of *Watson v. Bayliss*, 71 Wash. 499, 128 Pac. 1061. The two cases have nothing in common. In that case it was alleged that the plaintiff and the defendant agreed to organize a corporation for the purpose of carrying out a certain business enterprise; and we held that, under the allegations of the complaint and the proof submitted in support thereof, there was no meeting of minds upon the substantial features of the corporation.

The judgment is affirmed.

CROW, C. J., MOUNT, and PARKER, JJ., concur.

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[No. 10928. Department One. March 12, 1913.]

CANAL LUMBER COMPANY, *Appellant*, v. KONG YICK
INVESTMENT COMPANY *et al.*, *Respondents*.¹

APPEAL—RECORD—QUESTIONS PRESENTED—PRESUMPTIONS. Upon an appeal in a mechanics' lien case, in which the lower court failed to find that the party to whom the material was furnished sustained any such relation to the owner of the property as would enable him to bind the property, under Rem. & Bal. Code, § 1129, and failed to find a compliance with § 1134, prescribing the contents of the notice of lien, and concluded that the plaintiff was not entitled to a lien, it must be presumed, in the absence of the evidence, that the court had sufficient reason to decline to make such findings.

APPEAL—REVIEW—RECORD — QUESTIONS PRESENTED — JUDICIAL NOTICE OF FORMER ADMISSIONS. The supreme court is governed by the record on appeal in each case, and on a second appeal after retrial, cannot, in aid of the findings, take judicial notice of admissions made on the former appeal.

APPEAL—REVIEW—BURDEN OF SHOWING ERROR. Where the evidence is not brought up on appeal, the presumption is that it supports the judgment, and it is incumbent on the appellant to show that the conclusions of law and judgment do not follow the findings of fact.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 27, 1912, upon findings in favor of the defendants, dismissing an action to foreclose a mechanics' lien. Affirmed.

Myers & Johnstone, for appellant.

Tucker & Hyland, for respondent Kong Yick Investment Company.

Gose, J.—This case is before us on the findings of fact and conclusions of law, the contention of the appellant being that the conclusions of law are not justified by the facts as found by the court. The facts found, material to the inquiry, as we view the case, are as follows:

“That between the 14th day of June, A. D. 1910, and the 15th day of August, 1910, plaintiff furnished to the de-

¹Reported in 130 Pac. 492.

fendant, Washington Interior Finish Company, certain lumber and materials to be used in the construction of that certain building or structure situate upon lots 1 and 8, block 54, D. S. Maynard's Addition to Seattle, King county, Washington, all of which materials were delivered to and used upon the property above described, and all of which were of the reasonable value of \$1,853.49. That no part of the same has been paid, except the sum of \$1,457.96, leaving a balance of \$395.53 due and owing the plaintiff. . . . That thereafter and within ninety days after the furnishing of said last item, to wit, within ninety days from August 15, 1910, plaintiff filed and recorded its lien, which is introduced in evidence and is recorded in Volume 36, of Liens, at page 603."

The material conclusion of law is as follows:

"That plaintiff is not entitled to a lien against the premises herein described, and that defendant, Kong Yick Investment Company, is entitled to costs against plaintiff herein to be taxed."

The appellant seeks to establish and foreclose a lien upon property in the city of Seattle owned by the respondent Kong Yick Investment Company, a corporation. The allegations in the complaint are that the appellant, at the special instance and request of the respondent Washington Interior Finish Company, a corporation, who was then and there the agent and contractor for the respondent Kong Yick Investment Company, sold and delivered to the latter certain lumber and materials, to be used and which were used in the construction of a building situated upon its property in the city of Seattle. This allegation was put in issue by the respondent Kong Yick Investment Company. The appellant further alleged that, within ninety days after it ceased to furnish material, it filed and recorded with the county auditor of King county its claim of lien, duly verified by oath, containing a statement of its demands, after deducting all just credits and offsets, with the name of the owner and the name of the reputed owner and the name of the contractor or agent of the owner of the property, together

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with a description of the property sought to be charged with the lien sufficient for identification. This allegation is also put in issue by the same respondent.

Section 1129, of Rem. & Bal. Code, gives a lien to every person furnishing material to be used in the construction of certain enumerated structures, for the material furnished, "whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter." Section 1130 provides that so much of the lot or parcel of land upon which the improvement is made as may be necessary to satisfy the lien, to be determined by the court on rendering judgment in a foreclosure of the lien, is also subject to the lien to the extent of the interest of the person or company "who in his or its own behalf, or who, through any of the persons designated in section 1129 to be the agent of the owner or owners caused the performance of the labor, or the construction, alteration or repair of the property." It will be observed that the complaint alleges a compliance with these sections of the statute. The court, however, did not find that the Washington Interior Finish Company sustained any relation to the owner of the property which, under the terms of the statute, would give it the power to bind the property. It must be assumed, in the light of the conclusion of law and the judgment in favor of the owner of the property, that the court had sufficient reason for declining to find that the Washington Interior Finish Company sustained any such relation to the owner.

It is further apparent that the latter part of the finding does not show a compliance with the statute, Rem. & Bal. Code, § 1134, which prescribes what the notice of lien shall contain.

This case was before this court and is reported in 67 Wash. 126, 120 Pac. 882, on an appeal from an order granting this appellant a new trial, and the appeal was dismissed for want of sufficient bond. The appellant now invites the court to take judicial notice of its record on the former appeal, and of certain admissions made in the former briefs in aid of the findings in this case. It is contended that the findings thus supplemented are sufficient to show that the Washington Interior Finish Company was a subcontractor, and as such the agent of the respondent Kong Yick Investment Company. The case is now before us after a new trial has been had, and we must be governed by the record here; that is, by the issues raised by the pleadings and the findings of fact, the conclusions of law, and the judgment. Reading these together, in the absence of the evidence, we cannot say (1) that the Washington Interior Finish Company sustained any such relation to the owner of the property as to give the appellant a right to a lien upon its property; and (2) we cannot say that the lien sought to be foreclosed complied with the statute. The presumption always is, in courts of general jurisdiction, that the evidence supports the judgment, and it devolves upon the party who attacks the judgment to show, either that the evidence does not support the judgment; or, failing to bring the evidence here, to show that the conclusions of law and judgment do not follow the facts as found by the court.

"The record in each particular case must be complete in itself and exhibit the ground upon which the final decision is based." *Lonsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833.

See, also, *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151.

On the record before us, we conclude that there is no error shown, and the judgment is affirmed.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10809. Department One. March 12, 1913.]

NORTHWESTERN MARBLE & TILE COMPANY, *Plaintiff*, v.
JOHN MEGRATH *et al.*, *Respondents*, JOHN
J. WARD *et al.*, *Appellants*.¹

CONTRACTS—BUILDING CONTRACTS—SPECIFICATIONS—CONSTRUCTION. Specifications of a contract for plumbing, requiring best quality “galvanized wrought iron or mild steel” pipe, confer an option upon the contractor to use either “galvanized wrought iron” or “mild steel.”

CONTRACTS — CONSTRUCTION — POWERS OF SUPERVISING ARCHITECT. The supervising architect for the construction of a Federal building, under a contract making his decision as to the proper interpretation of the specifications final and conclusive, has no power to require the use of “galvanized wrought iron” pipe, where the contract plainly gave the contractor the option to use “mild steel” pipe.

PARKER, J., dissents.

Appeal from a judgment of the superior court for King county, Main, J., entered August 6, 1912, upon findings in favor of certain defendants, in an action on contract. Reversed.

John W. Roberts, for appellants.

Million & Houser and *George Friend*, for respondents.

GOSE, J.—The respondents Megrath and Duhamel had a contract for the construction of the Federal building, in the city of Seattle. The appellants Ward and Scherer made a subcontract with them for the installation of the plumbing. The specifications, which formed a part of both the original and subcontract, contained the following provision: “All soil, waste, drain, down water, and vent pipe (unless otherwise specified) must be best quality galvanized wrought iron or mild steel screw-jointed pipe of standard weight and thickness.” The original contract provided that: “The decision of the supervising architect as to the proper inter-

¹Reported in 130 Pac. 484.

pretation of the drawings and specifications shall be final and conclusive." The contract further provided that all defective or unsatisfactory material or work should be remedied and removed at the expense of the contractors. Under the clause first quoted, the subcontractors, with the knowledge and approval of the superintendent in charge of the work and the respondents Megrath and Duhamel, installed "mild steel" pipe. After its installation, it was tested and approved by the superintendent of the work. The appellants, the respondents, and the superintendent of the work, construed the clause to give the contractor the option to install either "galvanized wrought iron" or "mild steel pipe." After the installation of mild steel pipe, the supervising architect directed the respondents to remove it and to install "galvanized iron pipe." The respondents in turn called upon the appellants to make the substitution; and upon their refusal so to do, the respondents made the change as directed, and now claim that the appellants should bear the expense thereof. Their claim was sustained in the court below, and this appeal followed.

The clause in controversy clearly confers an option upon the contractor to use either "galvanized wrought iron" or "mild steel." In other words, it specifies two kinds of pipe, with the option to the contractor to use either. The testimony shows that the words "mild steel" mean ungalvanized steel. The language in the specification quoted seems too plain to require construction further than to ascertain the meaning of the words "mild steel." When the appellants properly installed mild steel pipe of standard weight and thickness, they did all they had contracted to do, and the supervising architect had no warrant under the terms of the contract to arbitrarily direct them to remove it and install galvanized iron pipe. *Camp v. Neufelder*, 49 Wash. 426, 95 Pac. 640, 22 L. R. A. (N. S.) 376; 9 Cyc. 617, 618.

The respondents rely upon the clause which provides that the decision of the supervising architect as to the proper

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interpretation of the specifications shall be "final and conclusive." This clause did not warrant him in interpolating something into the contract not justified by any fair interpretation of its terms. In short, it did not justify him in requiring the parties to do that which the contract itself did not require. The power reserved to the supervising architect was to interpret the specifications, not to rewrite them.

The judgment is reversed, with directions to enter a judgment in harmony with this opinion.

CHADWICK and MOUNT, JJ., concur.

CROW, C. J., concurs in the result.

PARKER, J. (dissenting)—I dissent. Respondents' original contract was with the United States government. Hence they were helpless as against the demands of the supervising architect, so far as legal procedure is concerned. Appellants, as subcontractors, by the terms of their contract subjected themselves to the same hazard, and should not be permitted to recover from respondents for work under their subcontract which respondents cannot recover for under their original contract.

[No. 10930. Department One. March 14, 1913.]

**THE STATE OF WASHINGTON, on the Relation of Marie
Caffrey, Plaintiff, v. THE SUPERIOR COURT FOR
KING COUNTY *et al.*, Respondents.¹**

SCHOOLS AND SCHOOL DISTRICTS—ORDERS OF SCHOOL BOARD—DISCHARGE OF TEACHER—APPEAL—DISQUALIFICATION OF SCHOOL SUPERINTENDENT—REVIEW BY COURTS. The superior court has jurisdiction of an action to review a decision of a board of school directors discharging a teacher, where the county superintendent of schools had disqualified himself from reviewing the decision on the appeal provided by law, by appearing at and dominating the school board meeting, demanding the teacher's resignation, and threatening her with cancellation of her certificate authorizing her to teach unless she resigned, and denying her any opportunity to be heard.

Certiorari to review a judgment of the superior court for King county, Dykeman, J., entered December 13, 1912, dismissing an action to review an order of a school directors' board, upon sustaining a demurrer to the complaint. Reversed.

Dudley G. Wooten, for relator.

John F. Murphy and *John P. Gallagher*, for respondents.

MOUNT, J.—This action was brought in the superior court of King county to review an order of the board of directors of school district No. 175, in that county, which order discharged the plaintiff as a teacher in the public schools. The trial court sustained a general demurrer to the complaint, and dismissed the action. Thereupon the relator sued out this writ to review that order of the superior court.

No question is raised as to the jurisdiction of this court to review the order in this manner, and we have concluded that the showing made in the petition is sufficient to confer jurisdiction upon this court. The question presented here is, Did the trial court have jurisdiction to review the order of

¹Reported in 130 Pac. 747.

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the board of school directors in discharging the relator as a teacher? The relator relies upon the allegations in her complaint to the effect, that she had entered into a contract with the board of directors to teach in said school district for the school year 1912-13, for the stipulated salary of \$75 per month; that she was qualified and authorized to teach in this state, and that in April, 1912, she entered upon her duties under her contract and continued thereafter to perform the same; that, on November 4, 1912, a meeting of the board of directors was held in said school district; that Mr. Burrows, county superintendent of schools for King county, was present at said meeting and directed and dominated the proceedings thereof; that certain persons were permitted to make oral charges against the plaintiff; that said meeting was without notice to the plaintiff, and she was not permitted to be present or hear said charges and no record was made thereof; that after said charges had been made against her, Mr. Burrows,

“Said that she must resign, and upon plaintiff’s replying that she would not resign under such circumstances, without being given an opportunity to know what she was charged with, and without being allowed to defend herself, or to have a fair and impartial trial, the said Burrows again announced that she must resign and that if she did not he would make the board of directors discharge her and would cancel her teacher’s certificate. . . . That thereafter, to wit on November 8, 1912, another meeting of said board of directors was held, at which said Burrows was again present and directed and controlled all that was said and done; . . . that at said second meeting no further investigation or examination of witnesses or hearing of testimony was had, nor was plaintiff any further or differently advised and notified of the charges against her then as before described at the first meeting of November 4, but when said second meeting convened said Burrows demanded of plaintiff why she had not resigned, and again declared that if she did not resign he would have her discharged and cancel her certificate; that no record of any proceedings against the plaintiff was made or

kept; that on November 18, 1912, plaintiff was served with a copy of the resolution, as follows:

"At a regular meeting of the board of directors of school district No. 175, of King county, Washington, held at the Duwamish school on the 16th day of November, 1912, at 7:30 o'clock p. m., it appearing to the board of directors that it will be impossible to retain the services of Miss Marie Caffrey as a teacher, it having been first shown to the entire satisfaction of the board of directors by evidence introduced at two different meetings held for the purpose of making an investigation into the conduct of said Marie Caffrey, as teacher, one meeting being held on the 4th day of November, and the other on the 8th day of November, 1912, at the Duwamish school, and evidence having been introduced at said meetings to the effect that, together with other things, Miss Caffrey had been guilty of using improper language before the pupils toward the principal, and also of degrading a pupil without the consent of or without consulting the principal. Therefore, in view of the above facts, it is resolved that the services of Miss Marie Caffrey be dispensed with, and that she is hereby discharged, said discharge to take effect on the 2nd day of December, 1912.

"O. G. Rosberg and

"P. P. Brandon,

"Directors of School District No. 175."

The complaint then alleges that the statements in the resolution to the effect that evidence was heard was false; that no evidence was offered to prove plaintiff guilty of using improper language to the principal, or that plaintiff had degraded a pupil without consent of the principal, and denies that she ever at any time or place committed either of said offenses. The complaint, after setting up other matters showing prejudice of the county school superintendent and that the order of discharge was without cause, proceeds:

"That by the law and rules governing school matters in the state of Washington, plaintiff had the right of appeal from any adverse decision of the said board of directors to the superintendent of schools in King county, who is the said Burrows, and from the latter, in case of his adverse judgment, to the superintendent of public instruction of the state

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of Washington, with the period of thirty days in each instance within which to prosecute her appeal; and in case of an appeal to the county superintendent he is by law authorized to take evidence, summon witnesses and call for all records affecting the case, but in case of an appeal to the superintendent of public instruction no new testimony can be introduced or heard by him, but he must try and decide the appeal upon the record already made;"

that the plaintiff's right of appeal in lawful order in this case had been completely taken away because of the disqualification of the county superintendent as aforesaid.

It is upon these and other allegations of like character that the relator here insists that the lower court had jurisdiction to review the order of the board of school directors in discharging the relator. The respondents insist that the superior court had no jurisdiction because the jurisdiction to try this class of cases is vested by law in the county school superintendent, from whom an appeal lies to the superintendent of public instruction. *Van Dyke v. School District No. 77*, 48 Wash. 235, 86 Pac. 402, is relied upon to sustain this position. This case no doubt would be in point where the county superintendent was not disqualified by active participation in the controversy; but in this case it is alleged that the county superintendent dominated the school board and took an active interest in the controversy, and without giving the plaintiff an opportunity to be heard or to know the charges against her, and without any record of the proceedings being made, demanded her resignation and threatened her with discharge and to cancel her certificate authorizing her to teach in the state, unless she resigned. She demanded that she be informed of the charges against her and the right to be heard. These demands were denied, and she was discharged without cause. To say that she must now appeal to the officer who dominated these proceedings and made, or at least directed, the order, is to say that the county superintendent may be the accuser and the judge in the same controversy. Neither the statutes nor the decision in the *Van*

Dyke case, *supra*, was intended to bring about that result. In *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 67 Am. St. 706, 40 L. R. A. 317, this court, speaking through Judge Dunbar, said upon this point:

“To compel a litigant to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it, no matter what the evidence may be, would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression ‘administration of justice.’ ”

The allegations in the complaint were sufficient to show that the county superintendent was utterly disqualified to hear an appeal in this case, and since there is no provision for any other person to hear it, the plaintiff is without remedy except in the courts. The superior court, therefore, had jurisdiction to review the order of the board of directors, and determine whether the order was made with or without cause.

The judgment of the trial court dismissing the complaint is therefore reversed, with directions to overrule the demurrer.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 10977. Department One. March 15, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. PAUL GRUNE,
Appellant.¹

CRIMINAL LAW—TRIAL—CONTINUANCE—DISCRETION—NECESSITY OF SHOWING—SPEEDY TRIAL. It is discretionary with the trial court to grant a continuance, after a criminal case has been set for trial, on its appearing that a material witness for the state, whose name was indorsed on the information, is temporarily absent from the state; and the accused cannot complain that he was denied a speedy trial or that a showing was not made as to the issuance of a subpoena for the witness, and the substance of his evidence, where the

¹Reported in 130 Pac. 751.

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accused was brought to trial within sixty days after the information was filed as required by Rem. & Bal. Code, § 2312.

LARCENY—BY FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY. A conviction of grand larceny by false representations is sustained where it appears that the accused represented that he had three hundred tons of potatoes, which he thereupon sold under an agreement to ship them from week to week, that he received as first payment a check for \$500, cashed the same and left the state, and when arrested admitted that he did not have any potatoes.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 22, 1912, upon a trial and conviction of grand larceny. Affirmed.

Alfred Gfeller, for appellant.

John F. Murphy and *H. B. Butler*, for respondent.

MOUNT, J.—The appellant was convicted of the crime of grand larceny, committed by false and fraudulent representations. He appeals from a judgment entered upon the verdict of a jury. Two points are argued, which we shall notice.

(1) After the appellant had been arraigned and had entered a plea of not guilty, the case was set for trial on May 22, 1912. On the day previous to that date, the prosecuting attorney served upon appellant's counsel a notice of motion for a continuance, upon the ground that an essential witness whose name was indorsed upon the information was then in Honolulu, Hawaiian Islands, and could not be reached with a subpoena. The court, after hearing the motion, granted a continuance of the trial until June 10, 1912.

The appellant argues that the granting of this continuance was error, because the appellant was entitled to a speedy trial, and because the affidavit in support of the motion did not state that a subpoena had been issued for the witness, and did not state the substance of the evidence which the witness would give. The granting of a continuance is discretionary with the trial court. *Thompson v. Territory*, 1

Wash. Ter. 547; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557.

The defendant, no doubt, was entitled to a speedy trial. When a defendant is not brought to trial within sixty days after the information is filed, the court is required to order the action dismissed, unless good cause to the contrary is shown. Rem. & Bal. Code, § 2312. Within that time it would seem the prosecution might bring the case to trial or have it postponed from time to time, in the discretion of the court, without a showing. In this case the information was filed on May 8, 1912. Defendant was arraigned and the case set for trial on May 22. On that day it appeared to the court that a material witness for the state, whose name was indorsed upon the information, was temporarily absent from the state. It seems plain under these circumstances that the court did not abuse its discretion in ordering the continuance upon motion of the prosecuting attorney.

(2) The appellant next contends that the evidence is not sufficient because it is not proved that the representations made by the appellant were false. The facts are these: On March 25, 1912, the appellant, at Seattle, represented to Frank S. Warner that he—appellant—had three hundred tons of potatoes which he desired to sell. After some negotiations, Mr. Warner agreed to purchase two hundred and fifty tons of potatoes from appellant, at \$30 per ton, f. o. b., Everson, Washington, where appellant resided; \$500 was to be paid at once, and the balance was to be paid as the potatoes arrived in Seattle. "Shipments were to be made about two cars per week." A written contract was entered into to that effect. Mr. Warner, relying upon appellant's statements that he had the potatoes, gave to appellant a check for \$500. Appellant immediately cashed this check at a saloon in Seattle. Thereafter, on April 2, 1912, when the potatoes were not shipped to him, Mr. Warner mailed a letter to the appellant at Everson, and not hearing therefrom, on April

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5, Mr. Warner mailed another letter to the appellant at the same place. These letters were not claimed, but were returned to the writer. Mr. Warner then employed a detective to find the appellant. He was found in Portland, Oregon, on April 13, 1912, and brought back to Seattle. While the appellant was in the custody of the officer, he admitted that he had no potatoes, but said that he had agreed to purchase some from a farmer and had paid one dollar thereon. Appellant's counsel insists that there is no evidence that the appellant did not own or control the potatoes at the time the contract was made. It is true that no witness testified or had any knowledge about what potatoes the appellant had at the time the contract was made, but the fact that the appellant did not ship the potatoes as he had agreed to do, or at all, and the fact that he had left the place where he resided and afterwards confessed that he had no potatoes, is almost conclusive that he had none at the time the contract was made, or afterwards.

We are satisfied that the evidence made a plain case for the jury. Judgment affirmed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 10743. Department Two. March 15, 1913.]

OMA GATES, *Appellant*, v. FRANK SHAFFER, *Respondent*.¹

LIMITATION OF ACTIONS—SEDUCTION — ACCRUAL — DISABILITIES—MINORITY. Since, under Rem. & Bal. Code, § 186, only females over twenty-one years of age may maintain an action for their own seduction, the right of action for seduction while a minor accrues to her when she becomes twenty-one years of age; and not at the age of majority, eighteen years, under § 8743; and the action must be commenced within three years after becoming twenty-one, under § 159, requiring an action for seduction to be begun within three years after the cause accrues, and § 169, providing that, if the per-

¹Reported in 130 Pac. 896.

son entitled to bring an action be under twenty-one when the cause accrues, the time of the disability shall not be a part of the time limited.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 15, 1912, dismissing an action for seduction, upon sustaining a demurrer to the complaint. Reversed.

Dan Pearsall and *A. Emerson Cross*, for appellant.

James P. H. Callahan, for respondent.

FULLERTON, J.—The appellant instituted this action against the respondent to recover damages for her own seduction. A demurrer to her complaint was interposed and sustained, and upon her election to stand on the complaint, judgment of dismissal was entered against her. From this judgment, she appeals.

The trial court sustained the demurrer to the complaint on the ground that the action had not been commenced within the time limited by law. It appears from the complaint that the acts of seduction took place in February, 1908; that the appellant reached the age of twenty-one years on March 30, 1911, and that the action was begun by the filing of a complaint on February 1, 1912. The court ruled that the action to be within the statute should have been commenced within three years after March 30, 1908, the time when the appellant, according to the dates given in her complaint, arrived at the age of eighteen years.

The chapter of the code prescribing the period of limitations of action provides that an action for seduction shall be begun within three years after the cause of action accrues. Rem. & Bal. Code, § 159. It also provides that if a person entitled to bring an action mentioned in that chapter shall "be at the time the cause of action accrued, either under the age of twenty-one years, or" under certain other disabilities mentioned, "the time of such disabilities shall not be a part of the time limited for the commencement of the action."

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Id., § 169. With reference to the persons who may maintain an action for seduction, the code, after providing that such an action may be maintained by a father, or in case of his death or desertion of his family, by the mother for the seduction of a daughter, and by a guardian for the seduction of his ward, further provides:

“Sec. 186. An unmarried female over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in the preceding section, shall be a bar to an action by such unmarried female.”

The code also provides, Id., § 8743.

“Males shall be deemed and taken to be of full age for all purposes at the age of twenty-one years and upwards; females shall be deemed and taken to be of full age at the age of eighteen years and upwards.”

It was the opinion of the trial court that the words “twenty-one years” where they occurred in §§ 169 and 186 from which we have quoted should not be construed literally, but rather as meaning “age of majority;” and since a female in this state reaches the age of majority at the end of her eighteenth year, the statute of limitations relating to an action for seduction runs from that period, and not from the end of her twenty-first year as the statute seems to imply.

But we are not able to give the statute this construction. Did the section of the statute relating to personal disabilities stand alone, there would be reason for the holding of the trial judge, since that particular section is general and applies to males as well as females, and to a variety of actions other than actions for seduction. But this is not true of the section last cited. That section applies only to females and only to the action for seduction. It contains the grant of authority to bring such an action. Since at common law a woman who had been seduced could not maintain an action

in damages against her seducer, except perhaps where the relation of guardian and ward existed between the seducer and the seduced, the right to maintain the action in cases like the one before us exists only in virtue of the statute. Being a question of statute solely, the legislature could annex such limitations to the right as it pleased, and since it has provided that such an action can be maintained only by an unmarried female over the age of twenty-one years, we do not think the courts should prescribe a different limitation.

The judgment appealed from is reversed, and the cause remanded with instructions to overrule the demurrer, and proceed to a hearing of the cause upon the merits.

CROW, C. J., MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 10788. Department Two. March 15, 1913.]

THE STATE OF WASHINGTON, *on the Relation of School District No. 25 in Walla Walla County, and No. 100 in Columbia County, Appellant*, v. BOARD OF COUNTY COMMISSIONERS OF COLUMBIA COUNTY, *Respondent*.¹

SCHOOLS AND SCHOOL DISTRICTS — JOINT DISTRICTS — ESTABLISHMENT—PROCEEDINGS—APPEAL—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 4457, providing that the decision of two county school superintendents creating a joint school district from the territory of two counties shall be final, there is no appeal therefrom to the board of county commissioners of one of the counties, as provided for by other sections of the school code in the case of specified decisions of a county school superintendent covering territory lying wholly within the same county.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered August 6, 1912, upon findings in favor of the defendants, dismissing a writ of certiorari to

¹Reported in 130 Pac. 749.

review a decision of the board of county commissioners reversing an order of county superintendents of schools creating a joint school district. Reversed.

T. P. Gose and Milton O. Pickett, for appellants.

R. M. Sturdevant and Hardy E. Hamm, for respondent.

MORRIS, J.—In January, 1912, the county school superintendents of Columbia and Walla Walla counties, upon a petition duly presented to them and after due hearing, joined school district No. 4, of Columbia county, and school district No. 3, of Walla Walla county, into a joint district, known as school district No. 100, of Columbia county and school district No. 25, of Walla Walla county. Thereafter a resident of the joint district within Columbia county appealed from the order of the county superintendents joining the two old districts into the new joint district, to the board of county commissioners of Columbia county; which board accepted jurisdiction and reversed the order of the county superintendents. The joint district then, through an interested party, sued out a writ of certiorari, attacking the jurisdiction of the county commissioners of Columbia county to hear and determine the appeal. Upon a hearing the jurisdiction of the commissioners was upheld, and the writ dismissed. The relators appeal.

The appeal presents a simple question of law, Did the county commissioners of Columbia county have any jurisdiction to hear and determine the appeal? We answer, No. All questions relating to schools in this state are determined by the act of 1909, known as the School Code, and are found in Rem. & Bal. Code, § 4302 *et seq.* Section 4427 provides for the formation of new districts. Section 4433 provides for the alteration of boundaries of districts. Section 4436 provides for the alteration of boundaries of school districts by the extension of city limits. Section 4440 provides for the formation of consolidated districts. Each of these sec-

tions covers territory lying wholly within the same county, and in each case the right of appeal is expressly given from the decision of the county school superintendent to the board of county commissioners of the county in which the territory affected is situate. Provision is then made for joint school districts lying in two or more counties, under § 4448, providing:

“When the public good requires it, a school district may be formed of contiguous territory lying in two or more counties, and such districts shall be known as joint school districts. They shall be designated by a separate number for each county in which any portion of their territory may lie.”

Subsequent sections contain provisions for petitions, notice, and hearing appointment of boards of directors, filling of vacancies in such boards, transfers of territory, apportionment of funds, and adjustment of property. Section 4457 then provides, after referring to the hearing by the county superintendents of the counties interested and the adjustment of the matters contained in the previous sections:

“They shall make a full record of all such findings and terms of adjustment and the decision of said county superintendents shall be final.”

It seems to us there is little more to be said. There can be no question but that the whole matter was within the power of the legislature to determine, and it had the right to say when and under what circumstances the action of county superintendents should or should not be final. We can see good reason for granting the right of appeal to the county commissioners when the territory affected was wholly within one county, and denying it when that territory was embraced within two or more counties. In the first case, a finality of decision as to all the territory affected could be determined by the appeal. In the second case, it could not; for if an appeal would lie on behalf of the territory in one county, it would lie on behalf of the territory in the other counties, each appeal being taken to the respective boards of county

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commissioners; each board reaching its own conclusion, with the possibility of as many conflicting decisions as there were boards of county commissioners. There could be no finality in such a procedure. In fact it would border on the absurd. Evidently the legislature foresaw this when it provided that, in cases affecting property in two or more counties, the decision of the county superintendents should be final. The whole matter was to be determined by the requirement of "the public good," as provided in § 4448, and the legislature determined that the "public good" could best be served by giving the right of final decision to the county superintendents rather than risking a ridiculous situation and giving each board of county commissioners the opportunity of determining how the joinder should be formed and the other attendant questions determined. For it is manifest that, in cases of territory within different counties, no board of county commissioners could have jurisdiction over territory in other counties. So that, if any appeal was to be taken as in the other instances in which the right is granted, the persons interested in each fraction of the whole territory would appeal to its own board; and with the possibility of conflicting determinations, the joinder would be as effectually dead as if the right was withheld in the first instance. The discretion vested in the respective county superintendents must, of course, be exercised in such a manner as to be free from fraud, abuse, and other kindred evils. The courts are always open for the determination of such matters. The county superintendents must act according to law and within the law. When they so act, their determination of the merits of the questions submitted to them is final. When they do not so act, their findings may be reviewed by any court of competent jurisdiction. *State ex rel. McCallum v. Superior Court*, ante p. 144, 129 Pac. 900.

Section 4457, before referred to, is as follows:

"At the hearing for the formation of a joint school district, the county superintendents shall, in case the petition

is granted, hear testimony offered by any person or school district interested therein, for the purpose of finding and determining the amount and value of all school property of whatever nature involved in the proposed action, the nature and amount and value of all bonded, warrant and other indebtedness of the original school district or districts out of whose territory such joint district is formed, including all legal uncompleted obligations then existing, and in so doing shall consider the amount of such outstanding indebtedness incurred for current expenses, the amount incurred for permanent improvements, and the location of such improvements, and shall make an equitable adjustment of all property, debts and liabilities among the districts involved. They shall make a full record of all such findings and terms of adjustment and the decision of said county superintendents shall be final."

Under this reading, respondent contends that the final "findings and terms of adjustment," spoken of in the last sentence, refer only to "an equitable adjustment of all property, debts and liabilities among the districts involved," and that as to these matters only was it intended to make the findings of the county superintendents final. This is too nice a distinction. The section, it will be noted, refers to "the hearing for the formation of a joint school district," the granting of the petition, and matters subsequently to be determined. There could be neither law nor logic in holding that the finding of the county superintendents was in part final and in part not final; final as to the adjustment of property rights between the districts, but not final as to the establishment of the joint district. In other words, by an appeal to the county commissioners, the action of the county superintendents in forming the joint district could be reversed, but the adjustment of "all property, debts and liabilities" could not be. Such a holding would lead to this result: A joint district is formed out of several old districts in adjoining counties, and the aggregate property and liabilities of these several old districts is adjusted and proportioned among the new districts. Upon appeal, the

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county commissioners annul the order forming the joint district, but having no power to disturb the adjustment of the property and liabilities, that finding remains as fixed by the county superintendents, and the several old districts find themselves sharing their property and liabilities with contiguous school districts in adjoining counties, with no added benefits on the one hand nor increased burdens on the other. To state such a theory is to refute it. It is plainly apparent that no such absurd result was ever intended by the legislature, and that the last sentence of the section giving finality to the action of the county superintendents was intended to cover all their authorized acts and doings in the formation of joint school districts from contiguous territory in two or more adjacent counties.

The judgment is reversed, and the cause remanded to the lower court with instructions to grant the writ as prayed for and enter its decree in accordance with the rule here announced.

Crow, C. J., ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 10833. Department Two. March 15, 1913.]

GEORGE SAMARDEGE, *Respondent*, v. HURLEY-MASON
COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE TO WORK—EVIDENCE—SUFFICIENCY—ASSUMPTION OF RISK. An action by a workman employed in piling up cement bags, for injuries sustained through the fall of a pile of bags, alleged to have been “piled too high” and in a negligent manner, must fail in the absence of any evidence to show the cause of the fall, or that the pile was improperly piled, especially where the plaintiff was experienced and might have assumed the risk of a dangerously high pile.

MASTER AND SERVANT—INJURY TO SERVANT—CAUSE OF ACCIDENT—RES IPSA LOQUITUR. In an action for injuries through the fall of a pile of cement bags injuring a workman engaged in piling bags,

¹Reported in 130 Pac. 755.

the doctrine of *res ipsa loquitur* does not apply, where there was nothing to indicate whether the fall was due to negligent piling or the act of a fellow servant.

Appeal from a judgment of the superior court for King county, Gay, J., entered July 19, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through the fall of a pile of cement bags. Reversed.

Peters & Powell, for appellant.

Philip Tworoger, for respondent.

MORRIS, J.—Respondent, in January, 1911, was engaged by appellant as a common laborer in piling up cement packed in bags weighing about ninety pounds. Some days before respondent went to work, other laborers had built a pile about thirty-five feet long and ten or eleven feet high. Respondent and two other laborers were building up other piles in front of this old pile, when it is alleged that it fell and injured respondent. The negligence charged and the cause of the fall was in permitting the old pile “to be piled too high” and “piled in a negligent manner, so that the same would not support its own weight.”

Counsel for respondent contented himself with showing the fall of the old tier and the consequent injury. No attempt was made to show the cause of the fall, that it was improperly piled, or too high; it being contended that, having shown the height of the pile and that it fell, it was a question for the jury to say whether or not the pile was too high, and further that the doctrine of *res ipsa loquitur* applies, and it was the duty of appellant to absolve itself from negligence. Neither of these contentions can be sustained. The jury could not by their verdict establish a fact until there was some evidence to support it. If, therefore, appellant desired a verdict based upon a finding that the cement was “piled too high” or “piled in a negligent manner,” as he had alleged in his complaint, he must furnish the jury some proof of that

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fact. We have too many cases holding that juries may not speculate as to causes of injury where negligence is alleged to even make reference to them helpful. When negligence is alleged as a fact, it must be proved as a fact. If this cement was piled too high or otherwise negligently piled, it seems to us it would have been a simple matter to prove it or offer some testimony from which a jury could so find.

If we were to look for causes for the falling of the bags of cement, we might find one in the testimony of appellant that two other laborers, who were engaged in the same work, were throwing the bags up against the pile that he says fell. Respondent had some experience in work of this character; for three years he had been employed in some iron works at Chicago, where much of his work consisted in piling up iron. We held, in *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615, that an experienced man could not recover for injuries from the falling of a pile of four-foot slabs, eighteen feet high; upon the ground that, if the pile was dangerously high, the danger was so open and apparent that any man ought to know it, and the risk was therefore assumed. Much that is said in that case is applicable here.

The doctrine of *res ipsa loquitur* cannot be applied to cases of this character. That rule, as applied to falling objects, covers cases where the occurrence is of such an unusual and extraordinary character that it would not happen except for want of due care, or that the cause of the fall was something over which the defendant had absolute and complete control; and that in the nature of things there could be no fall except in the negligent doing of some act peculiarly within the knowledge and control of the defendant. Here, as we have before said, there was no evidence showing how the accident happened; whether the cement was piled too high or in an unusual manner, or in an unsafe place, or in a dangerous manner, or whether it was due to the act of fellow employees in throwing bags of cement up against the pile. "The circumstances, therefore, leaving room for different

presumptions, the rule called for had no application." *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912 D. 433. Many cases are there referred to which are authoritative here.

We therefore hold it was error to deny appellant's motion for judgment notwithstanding the verdict, and for such error the judgment is reversed and the cause ordered dismissed.

Crow, C. J., FULLERTON, ELLIS, and MAIN, JJ., concur.

[No. 10814. Department Two. March 15, 1913.]

M. H. INGERSOLL, as *Administrator etc., et al., Appellants*,
v. THOMAS H. GOURLEY, as *Executor etc., Respondent*.¹

ABATEMENT AND REVIVAL—SURVIVAL—WILLS—CONTEST—DEATH OF CONTESTANT—STATUTES—CONSTRUCTION. The right to contest a will survives to the heirs or personal representatives of the heir of the putative testator, under Rem. & Bal. Code, § 1307, conferring the right to contest on "any person interested" in any will, and Id., § 193, providing that no action shall abate by death if the cause of action survive, and Id., § 967, providing that all other causes of action than those enumerated in § 183 survive, whether arising on contract or otherwise; the test of survivorship being the assignability of the cause of action.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 28, 1912, dismissing a will contest, after a trial on the merits to the court. Reversed.

M. H. Ingersoll and Reynolds, Ballinger & Hutson, for appellants.

J. L. Corrigan and M. H. Van Nuys (Milo A. Root, of counsel), for respondent.

ELLIS, J.—Appeal from the dismissal of an action to contest a will. The facts found by the trial court were substantially as follows: On June 1, 1911, Leslie L. Crim died. His sole heir at law was his mother, Miranda Crim.

¹Reported in 130 Pac. 743.

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On September 18, 1911, a paper purporting to be his last will and codicil was admitted to probate. The respondent Gourley was appointed and qualified as executor. On January 23, 1912, Miranda Crim and Leslie C. Travers, a nephew of Leslie L. Crim, commenced an action against the respondent as executor, to contest the will and codicil on the grounds of incompetency and undue influence. The action was tried, and on March 16, 1912, the court announced an oral decision upholding the will and codicil and deciding that Leslie L. Crim was neither incompetent nor under undue influence when he made them. It is conceded that no judgment was entered on this ruling.

On March 23, 1912, pending motion for a new trial, the court, being advised that Miranda Crim had died pending suit, suspended proceedings until an administrator might be appointed and substituted as plaintiff in her place. Miranda Crim died on February 2, 1912, at Rochester, New York, leaving as her heirs Leslie C. Travers, her grandson, and certain others. On April 25, 1912, the appellant M. H. Ingersoll was by the court appointed and qualified as administrator of the estate of Miranda Crim, deceased. He applied for substitution. Upon these findings the court, as conclusions of law, held that the right to contest the will and codicil did not survive the death of Miranda Crim, that the administrator of her estate had no right to be substituted as a party in the contest, that Leslie C. Travers had no right to continue the proceedings, and that the proceedings should be dismissed. Judgment went accordingly. It is apparently conceded that the original trial after the death of Miranda Crim was a nullity.

The sole question presented for our determination is, Does the death of a contesting heir of the putative testator terminate the contest of the will; or may the contest be revived and continued in the name of the administrator or heir of the deceased contestant? In other words, Does the right to contest a will survive to the heirs or personal representatives

of the heir of the putative testator? The question was before us in the recent appeal in *In re Siebs' Estate*, 70 Wash. 374, 126 Pac. 912, upon the following facts: Dorothy Drury Siebs died having willed all of her property to her sister, Mrs. Moulton. The will was probated May 5, 1902. Her immediate relatives were her sister, Mrs. Moulton, her brother, George W. Drury, and her father, William C. Drury. Whether or not she left a husband did not appear, and though that fact was adverted to by this court as an additional obstacle to the contest, the case was actually tried below and decided here upon the theory that her father William C. Drury was her sole heir at law. He died about six years after the death of Mrs. Siebs. George W. Drury, as an heir at law of William C. Drury, instituted proceedings to revoke Mrs. Siebs' will some seven years after its probate and some ten months after the father's death, on the ground that Mrs. Siebs was insane when she made the will. It was sought to escape the bar of the statute by showing insanity of William C. Drury, who but for the will would have been Mrs. Siebs' heir, from a time prior to her death until his own demise. While on the merits the case was decided adversely to the contestant on other grounds, the question of the capacity of the heir of an heir to maintain the contest met us at the very threshold of the case as necessarily involved before proceeding with the merits of the contest. Upon this phase of the case, we said:

"The respondents urge in this court the want of sufficient interest in the will in the appellant to enable him to maintain a contest thereof. They contend that a 'person interested in any will,' within the meaning of that phrase as it is used in the statute, must be a person who would himself, but for the will, have inherited the property devised and bequeathed thereby, and that the contestant is not such a person. But without specially reviewing the reasons advanced to support the contention, we think it is not well founded. If it be true that William C. Drury would have inherited the property of Mrs. Siebs but for the will, and if it be true, further,

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that he was so far insane as to be incapable of managing his own affairs from a time preceding the death of Mrs. Siebs until his own death thereafter, then his heirs at law have, we think, such an interest in the will of Mrs. Siebs as to enable them to maintain a contest thereof. We have found few cases directly in point, but the following may be consulted as bearing more or less strongly on the question: *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668; *Brady v. McCosker*, 1 Comstock (1 N. Y.) 214; *Van Allen v. Hewins*, 5 Hun 44; *Burnett v. Milnes*, 148 Ind. 230, 46 N. E. 464; *In re Langevin*, 45 Minn. 429, 47 N. W. 1133."

There can be no question that the case is authority for the right of the heir of an heir to contest a will adverse to his interest as such heir; that is to say, that the right of contest survives. Inasmuch as the case before us presents but the single question and has been submitted on exhaustive briefs supplemented by able argument on both sides, we are impelled to reconsider the question before adopting the rule in the *Siebs'* case as final. The statutory provisions relating to the survival of causes of action, citing by section number from Rem. & Bal. Code, are as follows:

"Sec. 193. No action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest."

"Sec. 967. All other causes of action [than those enumerated in section 183 *supra*] by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death against his personal representatives."

Section 183, referred to in section 967, relates merely to the right of action for wrongful death and has no bearing upon the present inquiry. These quoted sections have been

construed as not intended to define what causes of action survive, but as referring to causes which already survived and as merely directing in whose name the prosecution of such surviving causes may be continued. *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. 948; *Rinker v. Hurd*, 69 Wash. 257, 124 Pac. 687. Whether the right to contest a will does survive must, therefore, be determined upon the same principles as govern in other causes of action. If under such principles the right survives, then, under the statutes quoted, the action may be revived and prosecuted in the name of the personal representatives or successors in interest of the person originally entitled to contest.

It is a general rule, and one to which this court has adhered, that the test of survivorship of a cause of action is its assignability, and conversely, the test of assignability is survivorship—that is to say that they are always concomitant. 8 Pomeroy, Equity Jurisprudence (3d ed.), § 1275; Pomeroy, Code Remedies (3d ed.), § 147; *Slauson v. Schwabacher Bros. & Co.*, *supra*; *Conaway v. Co-Operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

Our statute governing the right of contest, Rem. & Bal. Code, § 1307, is as follows:

“Sec. 1307. If any person interested in any will shall appear within one year after the probate or rejection thereof, and, by petition to the superior court having jurisdiction, contests the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issue shall be made up, tried and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will.”

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While not in so many words declaring that the right of contest is assignable, the courts of several other states in effect have, under analogous statutes, so decided. The earliest case bearing upon the subject to which we have been cited is *Smith v. Bradstreet*, 16 Pick. 264. In that case the supreme judicial court of Massachusetts held that a mere general creditor of an heir at law of a testator has an interest too remote and contingent to entitle him to contest the will as a party aggrieved; but that, where the creditor of an heir had secured a lien by attachment upon the interest of the heir in real property, such creditor had the right to contest the will by which the heir was disinherited of such property. This is on the ground that by the attachment he secured a direct interest in the will. The court said: "If the will is proved, it defeats his title; if rejected, it establishes it." The obvious effect is that the interest of the heir is subject to involuntary assignment, and that such assignment carries with it the right to contest in aid of such interest.

In *Watson v. Alderson*, 146 Mo. 333, 48 S. W. 478, 69 Am. St. 615, a leading case upon the same question, under a statute allowing a contest to "any person interested in the probate of any will," within five years after such probate, the supreme court of Missouri held the same way. The Missouri statute is not essentially different from our own, save as to the time within which the contest may be instituted. In the *Watson* case, the levy of the execution of the judgment creditor of the heir and sale of the heir's interest under the execution were both subsequent to the disinheriting testator's death. The court said:

"That she [the judgment creditor] has a direct pecuniary interest in the final and conclusive determination of the question of fact, whether or not said instrument is the last will of said deceased is self-evident, since upon such determination depends her title to valuable real estate. If determined in the affirmative she has no title; if in the negative, she has title, and it would seem to follow necessarily, if the words 'any person interested in the probate of any will' are to 'be taken

in their plain, ordinary and usual sense' that she is such a person, and as such, authorized to institute this proceeding, in which only can that question of fact be conclusively determined."

The logical effect of this holding is that any one becoming directly and pecuniarily interested in the devolution of the estate, at any time within five years after the probate of the will, has such an interest in the "probate of the will" or, to use the words of our statute, is so "interested in the will," as to entitle him to maintain a contest under the statute.

In *Bloor v. Platt*, 78 Ohio St. 46, 84 N. E. 604, under a statute providing that "a person interested in a will or codicil admitted to probate in the probate court, or court of common pleas on appeal, may contest the validity thereof," the court held that a creditor of the heir having obtained a lien by levy on the interest of the heir after the testator's death, was entitled to contest a will disinheriting the heir. The court said:

"Any person who has such a direct, immediate and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested.'"

In *In re Langevin*, 45 Minn. 429, 47 N. W. 1133, the supreme court of Minnesota, under a statute providing that "all persons interested" may contest the probate of a will, held that a judgment creditor of an heir who was disinherited by the will could contest it because he was a person interested, in that his judgment lien would be defeated by the will if established. The court said:

"This right to resist the probate is not materially different in principle from that of a judgment creditor to assail a prior forged or fraudulent deed, apparently conveying the lands of the judgment debtor."

The analogy seems perfect, and it can hardly be doubted that the heir, as well as the creditor of the victim of a forged

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or fraudulent deed, may maintain an action to set it aside, in the absence of the bar of the statute of limitations or estoppel by laches. The heir may maintain the action because the right survives; the creditor, because it is assignable. Pomeroy, Equity Jurisprudence (3d ed.), § 1275.

In *Davies v. Leete*, 111 Ky. 659, 23 Ky. Law 899, 64 S. W. 441, under a statute using the words "persons interested," in defining who are proper or necessary parties to the probate proceedings, the supreme court of Kentucky held that the purchaser from an heir of the testator might resist the probate and by appeal contest the will. This is upon the obvious principle that the right, being assignable, carries with it the remedy. See, also, *Foster v. Jordan*, 130 Ky. 445, 113 S. W. 490; *Brooks v. Paine's Ex'r*, 123 Ky. 271, 90 S. W. 600.

In *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668, it was held that the grantee of the heir of a testator has such an interest in the controversy as entitles him to contest a will found and filed for probate after the grant. The fact that the will was found and filed subsequent to the grant seems unimportant, since the will, if valid, by relation took effect on proof as of the date of the testator's death. The court placed no stress upon this fact. It said:

"The demurrer was properly overruled. The allegations of the bill show such an interest in the subject-matter as entitles the appellees to impeach the will. Controversies of this character usually arise between persons claiming as heirs at law on the one hand, and as devisees under the contested will on the other. George L. Savage, as heir of Ann C. Savage, would have had the right to impeach the will, and no reason is perceived why those claiming under and through him are not entitled to his rights in that respect."

In *Rainey v. Ridgway*, 148 Ala. 524, 41 South. 632, the facts were as follows: The testatrix died, leaving a son as her sole heir at law. Thereafter the son died, leaving a widow as his only heir. It was held that she, as "a person interested therein," could contest the will. The court said:

"In other words, contestant's husband was the sole heir of the testatrix, and contestant is his sole heir, and sole devisee and legatee; she is certainly the party interested, or person who, standing in the place of her son, as his sole heir, who would be a distributee of the estate, if there were no will."

In *McCosker v. Brady*, 1 Barb. Ch. 329, the material facts were these: John McCosker died, leaving as his only heirs at law two sons, John the younger, and Thomas. He devised the bulk of his estate to John the younger, with an annuity to Thomas. John McCosker the younger thereafter died, leaving no other heirs than Thomas and Thomas's son, John Andrew McCosker. John the younger left a will devising his estate to others than Thomas and his son. Thomas brought suit to set aside John the younger's will on the ground of incompetency and undue influence. While this suit was pending, Thomas died and his son, John Andrew, as devisee of Thomas, commenced another action for the same purpose. The court held that, while John Andrew could maintain an original bill, the bill filed by John Andrew was in reality a bill to revive and continue the proceedings instituted by his father; and, as such, the bill could be maintained. The court said:

"If the original bill, however, was properly filed, for the purpose of having the question as to the invalidity of the pretended will of John McCosker the younger, settled under the direction of this court, there is nothing to deprive the devisee of the right to continue the suit for that purpose."

While this was an action in equity to set aside the will, it is certainly authority for the view that the right to contest a will survives.

In *Van Allen v. Hewins*, 5 Hun 44, it was held that the right to contest the probate of a will survives to the executors of the original contestant who died pending the proceedings.

The net result of the foregoing authorities is that the courts of Massachusetts, Missouri, Ohio, Minnesota and Kentucky, and it would seem Virginia also, hold the right or in-

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terest of the disinherited heir the subject of voluntary or involuntary assignment, which would, as we have seen, carry with it the survivorship of the right to contest the disinheriting will; while in Alabama, and apparently in New York, it is held that the heir of the disinherited heir may contest the will or revive a contest already commenced.

On the other hand, the courts of Illinois alone, under a statute according the right of contest to "any person interested" providing he appears within three years after the probate, hold that the right or interest of a disinherited heir is not assignable so as to give the assignee the right of contest, and hence that the right does not survive. *McDonald v. White*, 130 Ill. 493, 22 N. E. 599; *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. 211; *Staudé v. Tscharnier*, 187 Ill. 19, 58 N. E. 317; *Selden v. Illinois Trust & Sav. Bank*, 239 Ill. 67, 87 N. E. 860, 130 Am. St. 180; *Selden v. Illinois Trust & Sav. Bank*, 184 Fed. 872.

The controversy in the last case having arisen under the laws of the state of Illinois, the Federal court adopted and followed the construction placed upon those laws by the courts of that state. The decision has no significance except as determining the effect of the decisions of the Illinois courts.

The respondent invites us to follow the Illinois rule, the argument being that the right of contest being purely statutory, the words of our statute "any person interested in any will" should be construed as meaning a person having an interest at the time the will goes into effect; that an interest arising subsequently is not an interest in the will, and that a will cannot impair, destroy, or affect any property interest acquired after the death of the testator. This seems to us to beg the question, which is merely one of assignability and consequent survivorship.

Looking beyond the mere surface of the thing, the heir of an heir has, on descent cast, exactly the same direct pecuniary interest that the deceased heir had. In either case, but for

the will, the same property rights would have descended first to the heir, then to the heirs of the heir. We can see no sound reason, either in equity or in the words of the statute, for limiting the right to protect this interest by contest to the person in whom it is vested at the date of the testator's death. The nature of the interest is in no sense changed in passing from the heir to his successor. It is a property right in no sense purely personal to the heir of the testator, else it could not descend to the heirs of such heir even if there were no will. The statute does not, in express terms, nor by necessary implication, fix a specific time when the interest shall accrue in the contestant. It does fix a limit of one year within which the contest shall be instituted. It seems to us, therefore, that any person acquiring an interest within that year, which but for the will would accrue to his pecuniary advantage, should have the right to contest the validity of the will within that time. It may be stated as a sound postulate that, in construing remedial statutes, that construction will be preferred, if the language of the statute permit, which will subserve the right rather than that which may perpetuate a wrong. Assume that a will disinheriting the heir is forged, or procured by undue influence; the heir institutes a contest and dies pending suit, leaving children. The Illinois doctrine would deprive these children of any remedy and thus perpetuate the wrong. We cannot subscribe to a construction fraught with such possibilities, in the absence of a clear legislative mandate.

We are not impressed with the argument that will contests are avaricious and should not be encouraged. Fraudulent wills are also avaricious and should not be encouraged. While this argument may be sound to the extent of requiring clear proof of fraud or undue influence, it should not close the courts to the righting of wrongs. That is the very purpose for which courts were instituted. We are constrained to adhere to the rule announced in *In re Siebs' Estate*, *supra*.

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Statement of Case.

The judgment is reversed, and the cause remanded with directions to reinstate it and to permit the substitution.

Crow, C. J., Fullerton, Main, and Morris, JJ., concur.

[Nos. 10869, 10880. Department One. March 17, 1913.]

FIRST NATIONAL BANK OF EVERETT, *Appellant*, v.
T. F. WILCOX, *Receiver etc., Respondent*.

NORTH COAST DRY KILN COMPANY, *Appellant*, v.
T. F. WILCOX, *Receiver etc., Respondent*.¹

CORPORATIONS — RESIDENCE — SALES — CONDITIONAL SALES BY CORPORATION — FILING — COUNTY OF RESIDENCE. Under Rem. & Bal. Code, § 3679, providing that the articles of incorporation of a company shall contain the name of the city and county in which the principal place of business is to be located, the "residence" of the corporation is at such place, within the meaning of Id., § 3670, requiring conditional sales of personal property to be filed in the auditor's office of the county wherein the vendee "resides" at the date of taking possession of the property; hence a filing in another county where the company had a mill and where the property was situated is not notice to creditors of the vendee; especially in view of the further section, Id., § 3708½, requiring corporations to fix their principal place of business, which must be held to be their residence.

SAME — AMENDING ARTICLES — CHANGING PRINCIPAL PLACE OF BUSINESS. The filing of articles of incorporation in such other county where the mill and property was located, is not an amendment of the articles changing the residence of the corporation to such county, where the articles filed stated that the principal place of business was in the county originally fixed in the articles; especially in view of Rem. & Bal. Code, § 3679, providing the method of amending articles and § 3708½, providing for the filing of a certificate thereof, in case it is desired to remove the principal place of business to another county.

Appeals from judgments of the superior court for Chelalis county, Irwin, J., entered August 6, 1912, dismissing actions consolidated for trial, to recover personal property or its price. Affirmed.

¹Reported in 130 Pac. 756; 131 Pac. 203.

Cooley & Horan and *R. Mulvihill*, for appellant First National Bank.

Paul B. Phillips, for appellant North Coast Dry Kiln Company.

B. G. Cheney and *Hayden & Langhorne*, for respondent.

MOUNT, J.—These two actions were begun independently by the petitioners against the receiver of the Syverson Lumber & Shingle Company, an insolvent corporation, to obtain possession of certain machinery, or to have the contract price of the machinery adjudged a preferred claim against the insolvent estate. The actions were consolidated for trial. The trial court denied the prayers of the petitions, and these appeals followed.

Both cases are based upon the same facts. There is no substantial dispute upon the facts. It appears that, in the year 1911, appellants, under separate conditional sales contracts, sold and delivered to the Syverson Lumber & Shingle Company certain mill machinery. These contracts provided for certain stated payments, and that, if payments were not made as agreed, the vendors might retake the property. These contracts were filed for record in Chehalis county, where the mill of the Syverson Lumber & Shingle Company and the machinery in question were located. The Syverson Lumber & Shingle Company was a corporation organized under the laws of this state. Its articles of incorporation provided that its "principal place of business is at Tacoma, Pierce county, State of Washington." It maintained its head office in Tacoma, but its mill was located at Montesano, in Chehalis county. The products of the mill were kept and sold at Montesano. Some few sales, however, were made from the Tacoma office. After the execution of the conditional sales contracts above mentioned, the Syverson Lumber & Shingle Company made default in their payments, and subsequently that company became insolvent and T. F. Wilcox was appointed a receiver thereof, for the benefit of all the

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creditors. He qualified as such receiver, and took possession of all the property of the corporation, including the machinery sold under the conditional sales contracts above referred to. The appellant afterwards brought these proceedings as above stated. It will be noticed that the contracts were filed for record in Chehalis county, while the principal office of the vendee, Syverson Lumber & Shingle Company, is designated in its articles of incorporation as Tacoma, in Pierce county. The question in the case, therefore, is whether the conditional sales contracts are valid as to creditors.

The statute provides, at § 3670, Rem. & Bal. Code:

“All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers, and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides.”

It is argued by the appellants with much force that, inasmuch as the mills of the vendee and the machinery sold were located in Chehalis county and the principal business done there, Chehalis county should be held to be the residence of the corporation. Such holding would render the statute relating to corporations uncertain and of no substantial force. The statute, at § 3679, Rem. & Bal. Code, provides what the articles of incorporation shall contain, and among these provisions that “the name of the city, town, or locality and county in which the principal place of business of the company is to be located,” shall be stated. Articles of incorporation are required to be executed in triplicate, one to be filed in the office of the secretary of state, one in the county designated as the principal place of business, and one kept by the corporation. The object of these provisions is to

give the corporation a certain known place of residence, and to give notice of the principal place of business to all who may have dealings with the corporation. As indicating that the principal place of business as stated in the articles of incorporation is a material provision, § 3708¹/₂ provides:

“The formation or corporate acts of any corporation hereafter formed under this chapter shall not be rendered invalid by reason of the fact that its principal place of business may not have been designated in the certificate of incorporation: *Provided*, That within three months from the passage of this chapter, such corporation shall cause publication to be made once a week for at least four weeks in the newspaper published nearest the city, town, or locality, and where the principal place of business of such corporation has been in fact located, designating the city, town, or locality and county where its principal place of business shall be located. On compliance with the provisions of this section in the several cases herein mentioned, the principal place of business of any corporation shall be deemed established or removed at, or to any designated city, town, or locality and county in the state.”

It will thus be seen that corporations are required to fix their principal place of business in their charter. This principal place of business must be held to be the residence of the corporation.

“It is often necessary to ascertain the residence or domicile of a corporation within the state by or under whose laws it was created, not only for the purpose of determining the jurisdiction of the state courts in actions by or against the corporation, but also for the purpose of determining the application of statutes in relation to taxation and various other matters. The question is sometimes settled by express statutory provision, but this is not always the case. The general rule is that the residence or domicile of the corporation within the state is in that county, city, or town, and that one only, in which it has its general or principal office and conducts its business. . . .” 1 Clark and Marshall, Private Corporations, § 122.

See, also, *Union Steamboat Co. v. Buffalo*, 82 N. Y. 351; *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498;

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Creditors v. Consumers' Lumber Co., 98 Cal. 318, 33 Pac. 196; *Pelton v. Transportation Co.*, 37 Ohio St. 450.

In the last case cited the court said, at page 455:

"For many purposes, a corporation is regarded as having a residence—a certain fixed domicile. In this state, where corporations are required to designate in their certificates of incorporation the place of the principal office, such office is the domicile or residence of the corporation. The principal office of a corporation, which constitutes its residence or domicile, is not to be determined by the amount of business transacted here or there, but by the place designated in the certificate. True, several offices may be established at the place specified in the certificate, as it is sufficient, under this statute, to specify the 'county or place.' But where a single office is established in the county or township, or city, or other place designated, no further inquiry as to the identity of the principal office is admissible."

We are clear, therefore, that the place designated in the charter of local corporations as their principal office or place of business must be held to be the residence of such corporations. This being true, it follows that the conditional sales contracts were of no effect as to creditors of the vendee, because the contracts were not filed in the auditor's office of Pierce county, where the vendee resided.

The judgment is therefore affirmed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

ON PETITION FOR REHEARING.

[Decided April 8, 1913.]

MOUNT, J.—The appellant First National Bank of Everett has filed a petition for a rehearing herein because we failed to notice the contention that the place of residence of the corporation was changed to Chehalis county before the conditional bill of sale, dated August 25, 1911, was filed. It is true that a copy of the articles of incorporation was filed in Chehalis county before August 25, 1911, but the articles so filed stated that the principal place of business

of the corporation was Tacoma, in Pierce county. There was no amendment to the articles changing the principal place of business or residence, as required by § 3679, Rem. & Bal. Code; while § 3708½, Rem. & Bal. Code, provides that "any corporation desiring at any time to remove its principal place of business into some other county in the state shall file in the office of the county auditor a certified copy of its certificate of incorporation." This provision should be read in connection with § 3679, *supra*, in reference to amendments. That is to say, the stockholders or trustees must make the amendment changing the residence, and the same must be certified in triplicate and filed as in case of original articles. Otherwise confusion and embarrassment would result. The mere filing of the old articles in Chehalis county, stating that the residence was Pierce county, did not give notice of a change of residence, but had the effect of notice that the residence was not changed. The residence was not changed by a mere filing of the unamended articles in another county.

The petition is therefore denied.

CROW, C. J., PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 11081. Department One. March 18, 1913.]

THE STATE OF WASHINGTON, *on the Relation of the Board
of County Commissioners of King County, Plaintiff,*
v. THE SUPERIOR COURT FOR KING COUNTY,
*Respondent.*¹

APPEAL—SUPERSEDEAS—RIGHT To. Supersedeas is not a matter of right pending an appeal from an order directing the county commissioners to appoint a road supervisor from a list of names furnished by a good roads association, pursuant to Rem. & Bal. Code, § 5578, there being no right to a supersedeas in matters of public interest unless the parties can be kept *in statu quo*, or the damages compensated in money.

¹Reported in 130 Pac. 753.

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Opinion Per Curiam.

Application filed in the supreme court March 14, 1913, for a mandate to the superior court for King county, Everett Smith, J., to fix the amount of a supersedeas bond. Denied.

John F. Murphy and *Robert H. Evans*, for relator.

Vince H. Faben, for respondent.

PER CURIAM.—Relators have applied for a writ of mandate commanding the superior court for King county to fix a supersedeas bond, pending an appeal from the order of the superior court directing the county commissioners of King county to select and appoint a road supervisor from a list of names furnished by the Mercer Island Good Roads Association, the application for such appointment being made under Rem. & Bal. Code, § 5578.

We think this case is controlled by *Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916. In denying the application for a writ, it may be understood that we do not pass upon the merits of the controversy. The right of the commissioners to litigate the questions raised in the principal proceedings is not foreclosed, but pending that determination it is their duty to abide the judgment of the lower court. A statute declaratory of public interest should not be construed so as to defeat or suspend its operation pending an appeal, unless the right of the parties litigant can be kept *in statu quo* or the damages, if ascertainable, compensated in money.

Writ denied.

[No. 11005. Department One. March 18, 1913.]

THE STATE OF WASHINGTON, on the Relation of F. W. Luedinghaus et al., Plaintiff, v. THE SUPERIOR COURT FOR LEWIS COUNTY et al., Respondents.¹

EMINENT DOMAIN — PUBLIC USE — NECESSITY. Where a railroad company requires a right of way sixty feet wide in a canyon or gulch, in order to make necessary fills, cuts, and turnouts, an adjudication of public use is sustained, although the landowners, who were owners of a sawmill, needed part of the way for a logging road over which to haul forest products of their own and others.

Certiorari to review a judgment of the superior court for Lewis county, Rice, J., entered December 26, 1912, adjudging a public use in condemnation proceedings. Affirmed.

J. A. Shackelford and *F. D. Oakley*, for relators.

Dysart & Ellsbury and *Forney & Ponder*, for respondents.

CROW, C. J.—The Meskill & Columbia River Railway Company, a public service corporation, commenced an eminent domain proceeding in the superior court of Lewis county against G. F. Luedinghaus, Mary Luedinghaus, his wife, and F. W. Luedinghaus, to condemn a right of way for a logging road. On the preliminary hearing, an order was entered adjudging a public use and finding that a right of way sixty feet in width through defendants' land was required therefor. Thereupon the landowners, as relators, applied to this court for a writ of certiorari, and the order is now before us for review.

Relators are the owners of the southeast quarter of section 8, township 13, range 4, west of the Willamette Meridian, across which condemnation of the right of way is sought. They also own a sawmill at Dryad, Washington, to which they assert they intend to remove timber from their land and from the lands of others, by constructing a railroad to haul the

¹Reported in 130 Pac. 752.

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Opinion Per CROW, C. J.

same, charging reasonable rates. The sixty-foot strip of land which the trial court found necessary for respondent's use is located, to a considerable extent, in and along a gulch or canyon, and relators contend that, if the respondent is permitted to condemn to the full width of sixty feet, space will not remain in the gulch or canyon for their contemplated road; that they cannot construct their road to advantage along any other line; that, if respondent be confined to one side of the gulch and if the width of the strip to be taken be decreased, space will remain for the construction of their separate road. Relators' controlling contention is that the condemning company cannot and should not be permitted to appropriate more land than it actually needs for the purpose of constructing its road. This presents the question of fact, What amount of land is necessary for the right of way and the construction and maintenance of respondent's road? Relators, as private individuals, cannot exercise the power of eminent domain to acquire land for their proposed logging road, while respondent as a public service corporation is empowered to acquire by eminent domain proceedings such land as may be necessary for its right of way. The only issue presented is whether, in seeking an appropriation of a strip of land sixty feet in width, respondent is asking more than the public use requires. We have carefully examined the record and conclude that the findings of the trial court must be sustained. The evidence shows that a right of way sixty feet in width will be required for respondent's use in order that it may make necessary fills and cuts, construct switches, and side tracks, and protect its property and road-bed from fire and falling timber.

The judgment is affirmed.

PARKER, GOSE, and MOUNT, JJ., concur.

[No. 10926. Department One. March 18, 1913.]

C. P. FARRAR, *Respondent*, v. PETERSON & COMPANY,
Appellant.¹

ANIMALS—DAMAGES—PLACING DISEASED ANIMALS ON PREMISES OF ANOTHER—KNOWLEDGE OF OWNER. The owner of a horse affected with glanders is not liable for damages resulting from placing the animal in the barn of another, by permission, the public authorities afterwards destroying the barn, where notice that the horse was diseased could not be imputed to him.

TRESPASS—ACTS CONSTITUTING. The placing of a horse affected with glanders in the barn of another, under a permission to use the barn for horses that had been injured in grading work, is not a trespass.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 14, 1912, upon findings in favor of the plaintiff, in an action of tort, after a trial to the court. Reversed.

Herchmer Johnston, for appellant.

Earle & Steinert, for respondent.

PARKER, J.—This is an action to recover damages which the plaintiff alleges resulted to him from the defendant's placing in the plaintiff's barn a horse afflicted with the contagious disease called glanders, and thereby causing the barn to become so infected that it was destroyed by the public authorities. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff in the sum of \$226.50, from which the defendant has appealed.

Appellant had a street grading contract with the city of Seattle, upon which he was working a large number of horses. The respondent had a corral and barn near where this work was being carried on; and at the request of appellant's foreman, permitted their use, to place a few of the horses in. It

¹Reported in 130 Pac. 753.

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Opinion Per PARKER, J.

is evident that the purpose on the part of the foreman was to have a suitable place in which to put such of the horses as might become injured upon the work, or otherwise temporarily incapacitated. Respondent alleges in his complaint that permission was given to the foreman to occupy the corral, "and including a barn thereon, for the purpose of permitting certain alleged injured horses to run therein and to be sheltered in said barn." The substance of all of the evidence given in behalf of the respondent tending to show any agreed restricted use of the barn is contained in his own testimony as follows:

"Q. State to the Court the circumstances of this permission to use that barn? . . . A. He [the foreman] said he would like to have the use of the barn for three or four horses and wanted the barn so in case it should rain they could go under cover. Q. Did he refer to any special horses? A. No. Q. What did he say was the matter with the horses? A. Well, he said the horses had been hurt on the grading. . . . Q. To whom did you give that permission to use the barn? A. Mr. Espeland. Q. What was his position with the company? A. He was foreman."

On the following day, about July 1, 1911, one of the horses became indisposed, "off his feed," as termed by some of the witnesses, but apparently not seriously ill. It was then placed in respondent's corral and barn. It is not alleged in the complaint, nor is there any evidence whatever tending to show, that any of the officers or servants of appellant had any knowledge or reason to believe that the horse at that time was afflicted with glanders. About a week later, the horse not improving, a veterinary surgeon was called to attend it, and even then the surgeon did not discover that the horse was afflicted with glanders. A few days thereafter it was so discovered, when the barn was quarantined by the public authorities, and a short time thereafter the public authorities, deeming it impractical to disinfect the barn, caused it to be burned, resulting in plaintiff's damage for which he seeks recovery from appellant. Not only is there no allegation or

proof of knowledge which could be imputed to appellant that the horse was afflicted with glanders when placed in the barn, nor for more than a week thereafter, but there is quite convincing affirmative evidence that appellant had no such knowledge.

An examination of the authorities convinces us that the undisputed facts shown by this record do not render appellant legally liable for respondent's damage resulting from the destruction of his barn. This court has had occasion to consider the question of damages resulting from the acts of vicious animals, and in each case where damages were awarded against the owner of such animals, the actual or imputed knowledge of the owner, of the vicious propensities of the animal was regarded as one of the controlling facts fastening liability upon such owner. *Robinson v. Marino*, 3 Wash. 434, 28 Pac. 752, 28 Am. St. 50; *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923, 104 Am. St. 958; *Harris v. Carstens Packing Co.*, 43 Wash. 647, 86 Pac. 1125, 6 L. R. A. (N. S.) 1164.

It seems to us the principle here involved is the same, and so recognized by the authorities. 2 Cyc. 333, 368. In the case of *Hawks v. Locke*, 139 Mass. 205, 1 N. E. 543, 52 Am. Rep. 702, Justice Holmes, speaking for the court, in discussing the liability of owners of diseased animals for damages resulting from the placing of such animals by permission on the property of another, said:

"No decision, so far as we know, has gone further than to hold persons answerable if they knew that the animals were diseased, which neither the defendant nor his agents did in the case at bar."

In an exhaustive note to *Hurst v. Warner*, 47 Am. St. 551, the learned editor, after reviewing numerous cases, observes:

"It must be remembered that in all these cases knowledge of the condition of the diseased animals was brought home to their owner; and he cannot be held answerable where this

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Opinion Per PARKER, J.

knowledge did not exist, except perhaps where its absence could coexist only with gross inattention to his business and property. Even when the right to recover is founded on a statute forbidding the driving of diseased animals through any part of the state, and declaring that any person violating the statute shall be liable to any person injured for all damages that may arise from the communication of the disease, it has generally been held that the plaintiff must fail unless the defendant knew, or by the exercise of reasonable diligence should have known, of the existence in his animals of disease or of their capacity to communicate disease to others."

The comparatively recent decision of the supreme court of Idaho in *North v. Woodland*, 12 Idaho 50, 85 Pac. 215, 6 L. R. A. (N. S.) 921, is in harmony with this view. See note on page 922, to the same case in 6 L. R. A. (N. S.). We are of the opinion that the failure to allege or prove knowledge, or facts showing imputed knowledge, on the part of appellant, that the horse was afflicted with glanders until after the cause of respondent's damage had occurred, rendered the judgment of the trial court erroneous. It seems to us this—one of the principal controlling facts to sustain appellant's liability—is clearly wanting in this case.

Some contention is made that appellant is liable upon the ground of trespass, upon the theory that the placing of the horse in the barn of respondent, which was not injured but otherwise afflicted, was a trespass. But we think, taking respondent's own version of the contract or permission, it does not show that there was any agreement or understanding that the use of the barn was to be thus restricted. We think, therefore, that the placing of this horse in the barn was not a trespass.

The judgment is reversed, with directions to the trial court to dismiss the action.

CROW, C. J., CHADWICK, GOSE, and MOUNT, JJ., concur.

ON REHEARING.

[Decided July 16, 1913.]

PARKER, J.—This case was by mistake placed upon our calendar for the January term of this year, and called for argument in due course on January 30th. No counsel appearing at that time, we assumed that none desired to be heard orally. We thereupon treated the cause as submitted upon the briefs then on file. Thereafter the case was decided and an opinion filed March 18th.

Thereafter a petition for rehearing was filed upon the ground that counsel were deprived of oral argument by the cause being erroneously placed on the January calendar. Rehearing was accordingly granted, and the case orally argued during the present term. We regret that counsel were thus deprived of oral argument before we announced our decision. However, we have again carefully reviewed the questions presented, in the light of the oral argument and additional briefs, and conclude that the judgment of the trial court must be reversed and the case dismissed for the reasons stated in our opinion filed on March 18.

It is so ordered.

GOSE, MOUNT, and CHADWICK, JJ., concur.

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Opinion Per MORRIS, J.

[No. 10925. Department Two. March 19, 1918.]

A. L. PEARSON, *Appellant*, v. WILLAPA CONSTRUCTION
COMPANY, *Respondent*.¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE IN GRADING—LIABILITY OF CONTRACTOR—EVIDENCE—SUFFICIENCY. In an action by a pedestrian against a contractor doing street grading work, for injuries sustained when crossing a cable used in hauling dirt, a nonsuit is properly granted, where it appears that the plaintiff stood near the cable watching the work for about five minutes, and made no inquiry of an employee nearby, but stepped across and into the blight of the cable while it was lying idle on the ground, without giving any intimation of his intention to cross, there being nothing to show that defendant had any knowledge or intimation of plaintiff's danger or intention to cross (FULLERTON, J., dissenting).

APPEAL—REVIEW—HARMLESS ERROR. The granting of a nonsuit upon erroneous grounds will be sustained if the decision was correct upon any ground.

Appeal from a judgment of the superior court for Pacific county, Sol Smith, J., entered May 21, 1912, dismissing an action for personal injuries sustained by a pedestrian in passing street grading work, on granting a nonsuit. Affirmed.

Chas. E. Miller, for appellant.

Welsh & Welsh, for respondent.

MORRIS, J.—In November, 1911, the city of Raymond was opening up and grading a new street, known as Henkle street. This street was situate in an outlying district of the city and in a hilly and wooded section. The work was being done by respondent under contract. In doing the grading, respondent was using two donkey engines and a scraper, taking the dirt from the hilly part of the street and dumping it into the low places. These engines were about 600 feet apart. One hauled the scraper loaded with dirt down the hill, and the other hauled it back, a wire cable being used as a connec-

¹Reported in 130 Pac. 903.

tion. Appellant, on the day of his injury, followed a trail up the hill, until he came to the place where the work was being done and where he desired to cross. He saw one of the donkey engines on his right, and the scraper and cable moving to the left, until the scraper went out of sight around a bluff. He stopped and watched the operations for about five minutes, during which time the cable ceased moving. He saw a man, evidently an employee of respondent, standing about 100 feet to his left, but made no inquiries nor received any information. When the cable stopped, it lay in the loose dirt, with a slight bend or curve convexing toward appellant. He then started to cross, and as he stepped over the cable and had taken a step or two beyond, it started up, and in drawing taut, whipped up against his legs and caused the injuries complained of. This appeal is taken from the granting of a nonsuit.

In presenting his appeal, counsel for appellant contends that his case falls within the rule first established in *Davies v. Mann*, 10 Mees. & Wels. 546, and since followed by many English and American cases, to the effect that, when a plaintiff by his own negligence has placed himself in a dangerous position where injury is likely to result, the defendant with knowledge of the plaintiff's danger is bound to use reasonable care to avoid injuring plaintiff; and where, by the exercise of such care, defendant could avoid the injury but fails to do so, the defendant's negligence becomes the proximate cause of the injury and renders him liable. This is but another statement of the rule lately announced by us in *Nicol v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 409, 128 Pac. 628, and *O'Brien v. Washington Water Power Co.*, 71 Wash. 688, 129 Pac. 391.

But we can see no reason for its application here, for three reasons: (1) Appellant was not in a dangerous situation until he stepped over the cable; (2) there is nothing to show that respondent knew, or should have known, that appellant was about to step over the cable; (3) there is noth-

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ing to show that respondent knew, or had received any intimation, that appellant was in a dangerous position with regard to the cable when the cable was started. Hence, the basis upon which that contention rests—one person negligently exposing himself to danger, the other with knowledge of such fact omitting due care for the purpose of avoiding injury—is here lacking. Appellant could plainly see what was going on; the scraper and moving cable were plainly indicative of their use; and with these facts clearly before him, he chooses his own time to act, with no intimation or knowledge on the part of respondent that he was about to so act.

Appellant says the court below refused to grant the motion upon the ground of contributory negligence, holding that was a matter of defense; but based the ruling upon the ground that there was no evidence that respondent saw the appellant, or that it knew he was about to cross the street at that time and point, and further that it was not the duty of respondent to post notices in the daytime, nor to tell travelers not to cross. We are not so much concerned with the reasons for the lower court's ruling as we are with its correctness. No liability was established against respondent, and the lower court was right in so holding, whatever its reasons might have been.

Judgment affirmed.

CROW, C. J., ELLIS, and MAIN, JJ., concur.

FULLERTON, J. (dissenting)—I dissent. The trail which the appellant followed was one pointed out to him as the proper way by which to reach the place where he intended to go. It was one commonly used by all of the people of the neighborhood. It was not closed by barriers at the point it entered the street which was being graded, nor was there notices of any sort indicating that its use was discontinued. The cable which caused the appellant's injury was moving along the surface of the ground in one position when the

appellant first observed it, and there was nothing to indicate that it might not safely be crossed even though moving. He was not warned by the employee of the respondent whom he saw standing near that there was danger in crossing it, nor was he told by such person that the way he was pursuing was not still open for travel. As he stepped over the cable it was moved in an opposite direction from that in which it was being moved when he first observed it, and it was this change in movement that caused the cable to change its position on the ground. There is nothing in the record to show that the appellant was aware that the cable made these changes, and it is too much to say that he ought to have observed them. I think, therefore, that there was a liability established against the respondent, and that the question whether or not the appellant was guilty of contributory negligence was for the jury.

[No. 10632. Department Two. March 20, 1913.]

W. D. CHENEY *et al.*, Respondents, v. KING COUNTY *et al.*,
Appellants.¹

HIGHWAYS—VACATION — BY ABANDONMENT — OPENING FOR PUBLIC USE—WHAT CONSTITUTES. Rem. & Bal. Code, § 5673, providing that if any county road remains unopened for public travel for five years after the authority for opening the same is granted, it shall become vacated, applies to a dedicated street in the plat of an unincorporated town under the supervision and control of the county commissioners; and such a street is not "opened for public travel" by the fact that at the time the land was platted a footpath followed the general course of the platted way and was used for some time after the making and dedication of the plat until it was closed up.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 3, 1912, upon findings in favor of the plaintiffs, in an action for an injunction. Affirmed.

¹Reported in 130 Pac. 893.

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Opinion Per FULLERTON, J.

John F. Murphy and M. H. Ingersoll (Aubrey Levy, of counsel), for appellants.

Brightman & Tennant, for respondents.

FULLERTON, J.—On August 4, 1890, Joseph W. Range and wife, being then the owners of certain land situated in the body of King county, state of Washington, and without the limits of any incorporated city or town, platted the same into blocks, lots, streets and alleys as a townsite, filing for record with the county auditor a plat thereof on August 6, 1890. A street twelve feet in width is shown on the recorded plat as lying between blocks one and two. This twelve-foot way does not parallel the other streets shown on the plat, but runs diagonal thereto, following approximately the general direction of the shore line of Lake Washington, on which the platted land borders. Some five or six years prior to the commencement of the present action, the respondents acquired by mesne conveyances from the dedicators of the plat a tract described by metes and bounds which included practically all of the north half of block two, all that part of the north half of block one lying above the "high water line of Lake Washington," and all of the twelve-foot way lying between these parts of blocks one and two. Shortly after purchasing the property, the respondents began improving the same, and at the time of the present action had highly improved the property, fitting it up as a country home at a cost of many thousands of dollars. In September, 1911, the appellants, who are county officers of King county, Washington, conceived the twelve-foot way to be a public highway, and threatened to enter upon the respondent's enclosure and open the way to public travel. This action was thereupon begun to enjoin them from so doing. The respondents had judgment below, and this appeal followed.

The statute relating to the vacation of highways by non-user (Rem. & Bal. Code, § 5673), provides that if any county road, or part thereof, which remains unopened for

public use for a space of five years after the authority for opening the same is granted, shall become vacated, and the right to open it barred by lapse of time. In *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115, we held that this provision of the statute applied to platted streets in unincorporated towns which are under the supervision and control of boards of county commissioners. The sole question presented by this record is, therefore, was this way opened for public travel within five years after the dedication of the plat.

The evidence fails to show any formal opening of the way by the road supervisor or any other of the corporate authorities of King county. At the time the land was platted, there were foot paths along the lake shore which followed the general course of the platted way. These paths were undoubtedly used for some time after the making and dedication of the plat, and to some degree at least down to the time the respondent purchased the property in question and erected his enclosures, but the evidence convinces us that there never was any opening of the way to the public or any travel upon it as a public way, or any travel at all, except such as occurred incidentally by the following of the old paths. This was clearly insufficient to constitute an opening of the way such as the statute contemplates, and since more than five years elapsed between the time of the dedication of the way and the time the attempt to open it was made by the present county officers, the right to open it is barred by lapse of time.

The appellants cite cases to the effect that a highway will not be deemed abandoned merely because the travel on some part of it diverts in places from the platted or marked out way. But we may concede the authority of the principle announced in these cases without denying the conclusion we have reached on the question at issue. These cases have reference to actually opened ways in which the travel, because of some natural obstructions, has deviated from the

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Statement of Case.

laid out way. But in the case at bar, as we say, the way was neither formally opened for travel, nor was it ever traveled, except, as incidental to the fact that it was laid out in part over an existing traveled way.

The judgment is affirmed.

MOUNT, MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 10791. Department One. March 20, 1913.]

L. N. LISLE, *Respondent*, v. EDITH J. QUINLAN *et al.*,
Appellants.¹

REFORMATION OF INSTRUMENTS—DESCRIPTION—MISTAKE—INTENT—EVIDENCE—SUFFICIENCY. Findings that a contract to convey "all ground covered by 3 buildings" at a certain street number, subject to a mortgage, should be reformed to include a six-foot way to the west of the buildings on which there was a walk, are sustained, where it appears that the mortgage assumed by the grantee covered that portion of the lot, the balance of the lot retained by the grantor being subject to other liens and held as a separate property, that the grantor made statements at the time that the contract included all the portion of the lot covered by the mortgage, and that the walk to the west had the appearance of being constructed for the use of the buildings and was attached thereto, and the fact that such tract was in a sense one piece of property.

COSTS—PARTIES LIABLE—HUSBAND AND WIFE—JOINT LIABILITY. In an action for reformation, the husband of the defendant in interest cannot object that costs were awarded against the defendants jointly, where he answered jointly with his wife and did not disclaim interest.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 6, 1912, upon findings in favor of the plaintiff, in an action for reformation and specific performance. Affirmed.

Robert A. Devers, for appellants.

Carkeek, McDonald & Kapp, for respondent.

¹Reported in 130 Pac. 902.

PARKER, J.—The plaintiff seeks reformation and specific performance of a contract for exchange of real property, entered into by him with the defendant Edith J. Quinlan, whereby he agreed to convey to her certain lands in Benton county in exchange for certain real and personal property in Seattle, which she agreed to convey to him. The Seattle property so agreed to be conveyed to the plaintiff is described in this contract as follows:

“All ground covered by 3 bldgs. located at 806, 808-10 Col. St. in city of Seattle, together with all furniture therein. All interest, taxes, rents, etc. to be pd. to date, excepting \$6,000.00 mortg. on R. E. & \$730.30 on Furn. . . . \$6,000.00 mortg. on R. estate, \$730.30 on furniture.”

The reformation sought is to have this description read: “The easterly 78 feet of lot 8 in block 71 of Terry’s first addition to the town, now city, of Seattle, King county, Washington;” upon the ground that the parties to the contract did not then know the exact description of the land to be conveyed, and were mutually mistaken in the description made in the contract. Appellant D. M. Quinlan did not sign this contract with his wife. He was made a party defendant with a view to permitting him to set up whatever rights he might have in the property. They answered jointly upon the merits, and he did not disclaim interest in the property though the court eventually found it to be her separate property. A trial upon the merits resulted in the court’s decreeing the reformation and specific performance, as claimed by the plaintiff, from which the defendants have appealed.

This controversy has to do principally with the question of the quantity of land respondent is entitled to have conveyed to him under the exchange contracts, appellants contending that the respondent is entitled only to the easterly 72 feet of the lot, while respondent contends that he is entitled to the easterly 78 feet of the lot.

Appellant Edith J. Quinlan, at the time of entering into

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Opinion Per PARKER, J.

this exchange contract with respondent, owned as her separate property all of lot 8 upon which the buildings mentioned in the contract are situated. This lot is upon a corner fronting westerly upon Eighth avenue and southerly 120 feet upon Columbia street. The easterly 78 feet of the lot were then subject to the mortgage for \$6,000 mentioned in the contract, which respondent was to assume. Appellant was free to convey this portion of the lot, and could give good title thereto subject only to this mortgage. The westerly 42 feet of the lot were subject to a certain other lien by virtue of a decree of the superior court. It is apparent that these were held by her as two separate pieces of property. The buildings mentioned in the contract consist of three apartment houses adjoining each other, having the external appearance of a single building. These buildings have a southerly frontage upon Columbia street of 72 feet measured from the easterly end of the lot. To the rear of these buildings on the north there is an open space, some four or six feet wide, between them and the north line of the lot, occupied by a board walk. This ground it is conceded respondent is entitled to under the contract, with the ground upon which the buildings proper are situated. On the west, adjoining the westerly building and attached thereto, is a board walk running the entire length thereof from the front on Columbia street to and connecting with the board walk in the rear. This westerly walk is about three feet wide for a short distance back from Columbia street, where it extends in width to another building of Mrs. Quinlan on the westerly 42 feet of the lot, and where there are steps leading down northerly to the rear of that building, it being on ground considerably lower. There is, however, more convenient access to the rear of that building from Eighth avenue. There are several windows in the outer wall of the westerly building, including one leading into the basement at the level of the walk. The easterly 78 feet of the lot claimed by respondent would possibly encroach slightly

upon the steps leading down to the rear of the building on the westerly 42 feet, but would not reach to the eaves of that building, which are about two feet wide, by about eight inches.

There is testimony of several witnesses to conversations during the negotiations leading up to the signing of the exchange contract, in which Mrs. Quinlan stated in substance that she intended to exchange the same property as that described in and covered by the mortgage; also that she intended this westerly walk to be included in that property. She denied these conversations, but we are constrained to regard the preponderance of proof as being against her, as it was so regarded by the trial judge who heard and saw the witnesses. We have then these main facts lending support to the conclusion reached by the trial court: (1) The concession that the ground in the rear of the buildings was to be conveyed under the contract, indicating that the parties did not intend that the description in the contract was to be read literally, and confined to the ground covered by the buildings alone; (2) the statements of Mrs. Quinlan in conversation about the time she executed the contract, that all of the mortgaged property was included in the contract; (3) the fact that the walk on the west of the buildings had the appearance of being constructed for use in connection therewith and was attached thereto; and (4) the fact that the whole of the easterly 78 feet of the lot was in a sense one piece of property, and so regarded by Mrs. Quinlan. The facts, we think, support respondent's claim of reformation of the description and specific performance of the contract.

Some contention is made by appellant D. M. Quinlan against the decree in so far as it awards costs against both appellants jointly. In view of the fact that he answered jointly with his wife upon the merits, and did not disclaim interest in the property, we think he cannot now be heard to complain of the award of costs against him as well as his wife.

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Other contentions we think are wholly without merit and do not call for discussion. The judgment is affirmed.

Crow, C. J., Gose, Chadwick, and Mount, JJ., concur.

[No. 10835. Department One. March 20, 1913.]

C. F. KALER *et al.*, *Respondents*, v. PUGET SOUND BRIDGE & DREDGING COMPANY, *Appellant*.¹

JUDGMENTS—PERSONS AND MATTERS CONCLUDED—LAW OF THE CASE. Where, in an action against a city and a contractor, for damages to property through the filling up of low land under the police power, a nonsuit was granted as to the city, and no appeal was taken therefrom, a judgment against the contractor cannot be sustained on the theory that there was a taking or damaging of property without compensation first paid as required by Const., art. 1, § 16; since the nonsuit as to the city became the law of the case on that point.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGE TO PROPERTY—DEFECTIVE PLANS—LIABILITY. While a city may fill low lands as a sanitary measure without liability for consequential damages suffered by the lands within the district filled, it is liable for injury to abutting property; and when lands originally within the district have, by the engineer having authority to exempt property, been excluded from the district, they became abutting property within the above rule.

SAME — DAMAGE TO PROPERTY — DEFECTIVE PLANS — LIABILITY OF CONTRACTOR. Where a city furnished the plan and directed the work of filling up low lands, and damages to abutting property resulted, not from any negligence or wrongdoing of the contractor, who performed the work in the manner required by the contract, the contractors stand in the relation of agents of the city and not as independent contractors, and the liability rests upon the city and not upon the contractors, who cannot be held after a nonsuit is granted as to the city.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered June 11, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to property. Reversed.

¹Reported in 130 Pac. 894.

John W. Roberts and George L. Spirk, for appellant.

Thomas M. Vance and Harry L. Parr, for respondents.

CHADWICK, J.—This is a suit growing out of a municipal improvement in the city of Olympia, and known locally as the Swantown fill. The work was done under an invocation of the police power of the city, the ordinance reciting that it was “necessary and expedient on account of the public health, sanitation, the general welfare and the general improvement of the property located within the boundaries” of the district which are described in the ordinance. Two lots and a fraction which were included in the improvement district are owned by the plaintiffs. When the fill, which was made by a hydraulic dredger with silt and sand from the bottom of the bay, had so far progressed as to come up to plaintiff’s property, they asked and were granted the right to take a part of their property out of the district. They undertook at their own expense to build a bulkhead along the line agreed upon. The material used was old bridge flooring which was placed against some fence posts. As the work progressed, this gave way. A new line was agreed upon and a new bulkhead put in. The salt water and silt ran through and over the barrier and did considerable damage to the property of the plaintiffs. A trial was had and a verdict in the sum of \$500 was returned in plaintiffs’ favor. The city was made a party to the suit, but it appearing on the trial that no claim had been presented within the time fixed by law for the presentation of claims, it was dismissed out of the case, and the trial proceeded against the dredging company alone.

It is not denied that the ordinance and contract under which the work was done provided that it should be done strictly in accordance with the plans and specifications furnished by the city and under the direction of the city engineer, and the testimony shows that the changes made were sanctioned by that officer. One other fact material to our discussion is that the property of the plaintiffs was bounded on the

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north by a street, and on the west and south by property still within the improvement district and which the dredging company was bound to fill under its contract.

The arguments of counsel as set forth in the briefs have taken wide range, but the case, in so far as the liability of the appellant is concerned, can be quickly determined by reference to some of the cases heretofore decided by this court, and to one or two fundamental principles. One of the suggestions made by respondents, and which should be first determined, is that there has been a taking and damaging within the meaning of the constitution, art. 1, § 16, for which they are entitled to compensation; that the city being a trespasser, appellant could not escape liability because it had a contract to do that which was unlawful. Whether the damage suffered by respondents is such an injury as would sustain a recovery under the constitution, and to which the special statute covering the presentation of claims would not apply, is a question that cannot now be raised. Whatever the law may be, the trial court held that the city was not liable, and no appeal having been taken from that order, it has become the law of the case (8 Cyc. 791) and respondents must recover from the appellant, if at all, upon other grounds.

This court has held that it is within the police power of the city to fill low lying ground when necessary to protect the health, comfort and convenience of the municipality, and that any consequential damage suffered because thereof is in due process of law.

"It would be manifestly destructive to the advancement or development of organized communities to put the public to the burden of rendering compensation to one, or to many, when the individual use is, or might be, a menace to the health, morals, or peace of the whole community." *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709.

A proceeding in all respects similar to the one under discussion has been passed by this court as possessing no legal infirmity. *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

Consequently, the city council having determined that it was necessary to fill and improve the property of these respondents, no damages could have been recovered if the city had made the improvement in accordance with the original plan. While the city can improve property within the unsanitary district as determined by the ordinance, it does not follow that it can damage abutting property.

"Legislation tending to the preservation of the public health is favored by the courts, and is regarded as a power inherent in a municipal corporation where population is congested. 28 Cyc. 709; *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230. But the power must be exercised within a proper limit in this case, the filling of the district—and when the city goes beyond that limit, the legislature should provide, and it has in this case provided, for compensation to those whose property stands in the way. If it did not, it would result in the confiscation of unoffending property." *State ex rel. Stalding v. Aberdeen*, 58 Wash. 562, 109 Pac. 379.

See, also, *Donofrio v. Seattle*, ante p. 178, 129 Pac. 1094; *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385.

When the city, acting through its engineer, he having authority to exempt property, excluded a part of respondents' property, and drew new lines around it, it made the excluded lots abutting property, and it would become liable for such damages as might result to the abutting property from the manner in which the work was done. Now, admitting without deciding, that there was such damages for which the city could have been held, the question remains whether the city, which furnished the plan of the work and directed it in all particulars, having been dismissed out of the case, its contractor is liable. The negligence, if any, upon which a right of recovery could have been predicated, was the omission of the city to provide an adequate plan, or to make proper provision for carrying away the water and silt which, in the

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natural order of things, would seep through and over the bulkheads, and to care for the water that flowed from an artesian well which was on the premises. Because of these omissions, water was left standing on the lots, and trees and vegetation were killed. It is not shown that appellant has in any manner violated its contract with the city, or has failed to follow the plans and specifications, or refused to obey the orders and directions of the city engineer.

Negligence implies a wilful fault. In keeping with this principle it has been held by this, and generally by other courts, that where the fault lies in the plan furnished by the superior and the work is done under his direction, the contractor is not liable, in the absence of negligence. If negligent, he is held for his negligence and not as a trespasser. This case in principle and in many of its facts is not unlike the case of *Quinn v. Peterson & Co.*, 69 Wash. 207, 124 Pac. 502, where a recovery was denied. In *Potter v. Spokane*, 63 Wash. 267, 115 Pac. 176, it appeared that the damage for which a recovery was sought was caused by a defective bulkhead. It was held that, the plan being at fault, the contractor, who had done the work under a contract which "provided that the work should be performed according to certain plans and specifications described in the contract, and should be under the supervision, direction and control of the board of public works of the city, and its representative, the city engineer; and that in case of improper construction and noncompliance with the contract, the board had the right to order a partial or entire reconstruction of the work, or to declare the contract forfeited and relet the same to another contractor, and to adjust the differences that should arise between the city and the contractor by reason of the change;" was not liable.

The liability of the contractor was not expressly passed on in that case, or in *Cooper v. Seattle*, 16 Wash. 462, 47 Pac. 887, 58 Am. St. 46; but it would seem to follow from the reasoning of the court that the general rule would have been ap-

plied if it had been necessary to a decision. Peter Casassa brought suit against the city of Seattle and the Lewis & Wiley Company, contractors, for damages from slides suffered because of insufficient slopes to sustain a street grade. The city was held, but the contractor was exonerated, it appearing that the work was done under the direction of the city, and that there was no sufficient evidence of negligence to charge the contracting company. *Casassa v. Seattle*, 66 Wash. 146, 119 Pac. 18.

The general rule, as found by Mr. Dillon, is thus stated:

"Where a city, *acting within its general powers*, contracts for the grading of a public street, and in accordance with the conditions of the contract and the law prescribing the same, the work is done under the immediate supervision of certain officers, whose official duty it is to superintend the work, and the damages result, not from any negligence or wrongdoing of the contractors, but from the performance of the work in the manner required by the contract, *the contractors are the agents of the city*, and the city is liable for such damages." 4 Dillon, *Municipal Corporations* (5th ed.), 1655n.

See, also, 28 Cyc. 1280. We conclude that appellant was not an independent contractor, and that the liability for the damages sustained rested upon the city and not upon appellant.

We shall not discuss the other questions, some of which might in any event call for a new trial, as the foregoing is determinative of the case.

Reversed, with instructions to dismiss the suit.

CROW, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

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[No. 10684. Department Two. March 21, 1913.]

**M. P. HORTON, *Appellant*, v. OREGON-WASHINGTON RAILROAD
AND NAVIGATION COMPANY, *Respondent*.¹**

COMMERCE—EMPLOYERS' LIABILITY—INJURY TO SERVANTS EMPLOYED IN INTERSTATE COMMERCE—STATUTES—CONSTRUCTION. Since the first Federal employers' liability act, 34 Stats. at L., p. 232, was held unconstitutional for want of power in congress to legislate with reference to the liability of common carriers to employees not engaged in interstate commerce, the second employers' liability act, 35 Stats. at L., p. 65, providing that common carriers engaged in interstate commerce shall be liable to "any person suffering injury while he is employed by such carrier in such commerce," must be construed as intended to include every person who could be so included within the purview of the constitutional power.

SAME—LIABILITY TO SERVANTS EMPLOYED IN INTERSTATE COMMERCE—WHO ARE. One employed to operate a pumping plant for the purpose of supplying water to locomotives used indiscriminately by a railroad company in interstate and intrastate commerce, is within the purview of the second Federal employers' liability act, rendering the company liable to "any person suffering injury while he is employed by such carrier in such commerce," and such pumper was so employed at the time of his death, where he was at the time going to his work on a "speeder" over the company's tracks.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 31, 1912, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained by an employee of an interstate railroad. Reversed.

W. H. Plummer and *Henry Jackson Darby*, for appellant.

Arthur C. Spencer and *Hamblen & Gilbert*, for respondent.

ELLIS, J.—Action by the administrator of the estate of Wilbur F. Horton, deceased, for the benefit of the surviving widow and children of decedent, to recover damages for wrongful death under the Federal employers' liability act.

¹Reported in 130 Pac. 897.

The amended complaint alleged, in substance: That the defendant was a corporation engaged in interstate commerce by railroad; that the decedent was employed by the defendant as a pumper at Onyx, Idaho, and operated at that place a pumping plant for the purpose of supplying the locomotives of the defendant with water; that decedent lived two or three miles from the pumping plant, and that it was necessary for him to go to the plant daily; that for this purpose defendant furnished him with a small handcar called a "speeder;" that on October 8, 1910, while going from his home to the pumping plant and while operating the speeder on the track of the defendant, decedent was overtaken by an interstate passenger train; that decedent, upon becoming aware of the approach of the train, stopped the speeder, and for the purpose of avoiding a collision, consequent destruction of defendant's property, and probable loss of life, attempted to remove the speeder from the track; that while so doing, he was struck by the train and instantly killed; that defendant failed to exercise reasonable care to avoid the collision after becoming aware of his presence; that "the duties which said Horton performed and was required to perform both in going to and coming from his home to said water pumping plant, were acts and things incident to and made necessary in the operation of said company's trains, cars, and locomotives in the carrying on its business of interstate commerce by railroad and as an integral part thereof, and said Wilbur F. Horton was at the time of his death in the performance of said duties and in the employ of said company, and employed by it for the purpose of aiding and assisting it in the operation of its trains, cars, and locomotives, and in the carrying on of its business of interstate commerce by railroad." It was admitted that the decedent was a fellow servant of the persons operating the train. While not so alleged, it seems to be conceded that the defendant was engaged in both interstate and intrastate commerce. The trial court sustained a demurrer to the complaint upon the ground that the facts

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stated were not sufficient to invoke the benefit of the employers' liability act, and dismissed the action. The plaintiff appealed.

The first section of the employers' liability act of 1908, 35 U. S. Stats. at L., p. 65, ch. 149, provides:

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The sole question presented for our consideration is this: Was the decedent employed by the defendant in interstate commerce at the time of his death, so as to enable his representatives to invoke the benefit of this act? The earlier act of 1906 (34 Stats. at L., p. 232), was, in the *Employers' Liability Cases*, 207 U. S. 463, held unconstitutional as exceeding the power of Congress under the commerce clause of the constitution, in that it imposed a liability as against all common carriers engaged in interstate commerce in favor of any of their employees, without restriction and whether their employment did or did not pertain to interstate commerce. In those cases, however, all the justices concurred in recognizing the power of Congress to regulate the relation of master and servant by regulations confined to interstate commerce and services connected therewith. The act of 1908 above quoted was passed to conform to that decision, and should, therefore, be construed as including within the term,

"any person suffering injury while he is employed by such carrier in such commerce," every person who could be so included within the purview of the constitutional power. "The act meant to include everybody whom congress could include." *Colasurdo v. Central R. Co.*, 180 Fed. 832. That such was the purpose and intent of the second act seems to be assumed by the supreme court of the United States in an opinion holding the act constitutional. *Second Employers' Liability Cases*, 223 U. S. 1, 38 L. R. A. (N. S.) 44.

The inquiry is thus narrowed to the concrete question, Had Congress the constitutional power to enact a law regulating the relation between a common carrier engaged in interstate commerce and its servant who is employed in pumping water used by its engines both for interstate and intrastate commerce? If Congress had this power, then we must assume that it intended to exercise it in passing the present act. In determining the extent of the power of Congress and the consequent extent of the exercise of that power by this act, we are bound, whatever our personal views, by the decisions of the Federal courts. We are not called upon to decide whether, if an injury be inflicted by a person or instrumentality employed by the defendant in intrastate but not in interstate commerce, the act could in any event be invoked, since the case is here on demurrer and the complaint alleged that the train, and by necessary inference its crew, was employed in interstate commerce. It may be remarked in passing, however, as showing the sweepingly broad construction placed upon the act and the true criterion of the congressional power, that in the *Second Employers' Liability Cases*, *supra*, the supreme court expressly decided that the fact that the negligence which caused the injury was that of an employee engaged in intrastate commerce was immaterial, the true criterion being the effect of the injury upon interstate commerce, not the source of the injury.

As to the character of service in which the injured servant must be engaged in order to be subject to the congressional

power so as to enable the servant to claim the benefit of the act, the supreme court, in the cases mentioned, does not particularize, but contents itself with the broad holding that "the particulars in which those relations [of carrier—masters and employees] are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged." In those cases, *Second Employers' Liability Cases*, *supra*, two of the injured employees were locomotive firemen apparently employed on interstate trains, while the third was a car-repairer engaged in replacing a draw-bar in one of the defendant's cars then in use in interstate commerce, and was killed by fellow servants pushing other cars against the one on which he was working. In each of these cases it was held that there was such a real or substantial relation to interstate commerce in the employment of the injured person as to come within the regulating power of Congress and within the protection of the act.

In *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665, the plaintiff's regular work was the making of what is called "running repairs." An engine and tender used in hauling interstate trains had reached the end of their run, and were placed upon a fire track to await the time for starting upon the return trip. The plaintiff, while replacing a bolt lost from a brake shoe of the tender, was injured through the negligence of a fellow servant. It was held that he was employed by the carrier in interstate commerce and entitled to the benefit of the act.

In the foregoing instances, so far as the opinions show, the employment of the injured servant related solely to instrumentalities used in interstate commerce. There are, however, numerous cases in which it is held that, where the service of the injured servant contributed indiscriminately to both the interstate and the intrastate business of the carrier-master, the injured servant is entitled to the benefit of the act.

In *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893, the plaintiff, a section hand, was injured while employed in repairing

the main line of the defendant's railroad used both in interstate and intrastate commerce. The argument seems to have been advanced that, because the part of the track he was repairing lay wholly within the state, the plaintiff was not employed in interstate commerce. The late Judge Whitson, holding the employers' liability act applicable, used the following language:

"But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states—to deny the power of Congress over interstate commerce—but that the power extends to the control of those instrumentalities, through which such commerce is carried on is not an open question. . . . But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing

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to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose."

In *Colasurdo v. Central R. Co.*, 180 Fed. 832, plaintiff, a railroad trackman, was assisting in the repair of a switch in a railroad yard at night, the switch being used indifferently for both kinds of commerce, when he was struck and injured by certain cars. The court, holding that he was within the protection of the act, said:

"The track is none the less used for interstate commerce, because it is also used for intrastate commerce, and the person who repairs it is, I think, employed in each kind of commerce at the same time."

This decision was, on writ of error, affirmed by the circuit court of appeals in *Central R. Co. v. Colasurdo*, 192 Fed. 901, that court saying:

"We think the statute was intended to apply to every carrier while engaging in interstate commerce, and to an employe of such carrier while so engaged, and, if these conditions concur, the fact that the carrier and the employe may also be engaged in intrastate commerce is immaterial."

In *Behrens v. Illinois Cent. R. Co.*, 192 Fed. 581, the plaintiff's intestate was fireman of a switching crew whose duty it was to switch cars that had to move both in interstate and intrastate commerce indiscriminately. At the time of the accident, the train being moved originated within the state, and the freight carried constituted intrastate commerce. It was contended that neither the defendant nor the deceased employee was at the time engaged in interstate commerce so as to permit a recovery under the employers' liability act. The court said:

"In my opinion the construction sought to be secured by the defendant is entirely too narrow and restricted. Undoubtedly the act of Congress is in derogation of the common law; but certainly the elimination of the doctrine of fellow

servant and the modification of the doctrines of contributory negligence and assumed risk makes for the betterment of human rights as opposed to those of property, and I consider that, in the light of modern thought and opinion, the law should be as broadly and as liberally construed as possible. In this view of the case, I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employe himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

In *Northern Pac. R. Co. v. Maerkl*, 198 Fed. 1, the plaintiff's intestate, a car repairer employed in the defendant's repair shops connected with an interstate track, was injured while engaged in repairing a car used by the defendant indiscriminately in both interstate and intrastate commerce. The circuit court of appeals, in affirming the decision of the district court that the act applied, after pointing out that the car was one of the instruments of interstate commerce, said:

"It is equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the switch that passes the car from the repair shop to the main track to resume its place in the company's system of traffic, or any of the operatives who thereafter handle it in such traffic."

See, also, *Johnson v. Great Northern R. Co.*, 178 Fed. 643; *Freeman v. Powell* (Tex. Civ. App.), 144 S. W. 1033; *Jones v. Chesapeake & O. R. Co.*, 149 Ky. 566, 149 S. W. 951.

But it is urged that, even assuming that the employment of the deceased when actually pumping water was so related to

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interstate commerce as to meet the requirements of the act, still he was not so employed while going to his work. It is argued that the decedent at the time of his death was not "actually and actively engaged in interstate commerce." The word, however, used in the act itself as applied to the servant is "employed." It is somewhat difficult to see how he could have been *passively* employed, or employed at all without being *actually* employed. The act itself places no such tautological emphasis upon the word "employed." The deceased was going to the pumping station by the means supplied by the master. He was performing a necessary part of his employment in the manner contemplated by the master. The decision of the circuit court of appeals in *Lamphere v. Oregon R. & Nav. Co.*, 196 Fed. 336, reversing a contrary decision of the district court (193 Fed. 248) sustains the appellant here in every essential particular. There the decedent, a locomotive fireman, was on his way to the depot to secure a pass, board a passenger train, and go to another town and bring forward, as one of an engine crew, an interstate train. While on his way to the depot and in the yards of the defendant, he was killed by an interstate train. The court said:

"He was on the premises of the railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company. Must a fireman be actually in his place of duty on the locomotive of a train which is engaged in commerce between the states in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train and proceed across the track and take his place on another train engaged in interstate commerce and he is injured while on the way, will it be said that he was not employed in interstate commerce when he received the injury? The case supposed is substantially the case which is now before the court."

Nor can we see any real distinction between the case quoted and the one before us.

The decisions mainly relied upon by the respondent, as generally combatting the doctrine sustained in all of the foregoing citations, are *Pedersen v. Delaware, L. & W. R. R.*, 184 Fed. 737, and *Temura v. Great Northern R. Co.*, 58 Wash. 316, 108 Pac. 774. The *Pedersen* case is clearly out of harmony with the principles announced in all of the foregoing decisions. In the *Lamphere* case, *supra*, after citing the *Zikos* case, the *Colasurdo* case, the *Behrens* case, and others, the court, referring to the *Pedersen* case, said:

"The decision in that case runs counter to the cases above cited, and we think it is also opposed to the doctrine of the recent decision of the supreme court in *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1."

In our own decision in *Temura v. Great Northern R. Co.*, we did not have the advantage of the foregoing authorities, which it will be noted are all recent. Moreover, as we there said:

"It is not shown whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded."

In so far, however, as that case may be construed as running counter to the foregoing decisions, we are constrained by the overwhelming weight of those authorities to overrule it.

Tested by the criterion laid down in the *Second Employers' Liability Cases*, *supra*, and exemplified in the foregoing decisions, namely, by the effect of the injury upon interstate commerce, it seems to us too plain for cavil that the deceased when killed was employed by the carrier in such commerce, within the meaning of the act. Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate com-

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merce conducted by the master, as well as the local trains, must have ceased altogether. This demonstrates the "real or substantial" connection of his employment with such commerce. There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction it is too fine-spun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. The pumper's relation to actual transportation of interstate freight and passengers is much more direct and intimate than that of a car repairer or repairer of an engine tender who bestows his labor on instrumentalities while they are, so to speak, temporarily out of commission. To allow a recovery to these, and not to the pumper supplying the water for motive power in actual transportation, would smack of caprice. The demurrer to the amended complaint should have been overruled.

The judgment is reversed, and the cause is remanded for further proceeding in accordance with this opinion.

CROW, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

[No. 10751. Department One. March 28, 1913.]

MABEL V. MCGILL, *Plaintiff*, v. NETA BROWN *et al.*,
Defendants, JAMISON & COMPANY, *Respondent*,
A. K. ISHAM, *Receiver etc.*, *Appellant*.¹

ASSIGNMENTS—TITLE—WHEN PASSES—RECEIVERS—RIGHT TO ACCOUNT ASSIGNED PRIOR TO APPOINTMENT. Where a sale of pig iron was made to a manufacturer of iron posts, holding a contract with a city for posts, on the security of an assignment by the manufacturer of its claims against the city, which assignment was accepted by the city, title to the city warrant in payment of the posts passed to the seller of the iron; and a receiver of the manufacturer would not be entitled to the warrant by reason of the fact that part of the posts were delivered by him, or that an insignificant part of the work thereon was performed after his appointment as receiver; as the receiver would have no better title than the assignor of the warrant.

RECEIVERS—REMEDIES AGAINST—PROCEDURE. Where a receiver wrongfully obtained possession of a warrant that had been assigned by the receiver's insolvent, the regular procedure is for the assignee to obtain an order in the receivership case requiring the receiver to return it or its proceeds.

Appeal from an order of the superior court for King county, Myers, J., entered March 27, 1912, in favor of the claimant, in a proceeding against a receiver for money received, after trial on the merits to the court. Affirmed.

Shank & Smith, for appellant.

Edwin C. Ewing, for respondent.

MOUNT, J.—This proceeding was brought by E. P. Jamison & Company, a corporation, against the receiver in the case of McGill v. Brown et al., to require the receiver in that case to pay over to E. P. Jamison & Company the proceeds of a warrant, amounting to the sum of \$425.08, wrongfully collected by the receiver. The trial court, after hearing the evidence, made the order as prayed for. The receiver has appealed.

¹Reported in 130 Pac. 1142.

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There is substantially no dispute upon the facts, which are as follows: On May 4, 1910, Neta Brown, Florence C. Dawson and C. N. Dawson were copartners, doing business under the name of the West Coast Iron Works. On that day the copartners executed a mortgage covering all the assets of the company, to secure the payment of a certain sum of money. The descriptive clause in the mortgage concluded as follows: "And all accounts receivable now forming or hereafter to become a part of the business and assets of the said West Coast Iron Works." Nearly a year later, on to wit, May 25, 1911, the West Coast Iron Works was awarded a contract for the construction and delivery of twenty complete sets of police post castings to the city of Seattle for the price of \$480. Thereupon the West Coast Iron Works desired to purchase from E. P. Jamison & Company the pig iron necessary to construct these police posts. The Jamison Company refused to sell their iron without security for the purchase price. The West Coast Iron Works then agreed to, and did on July 3rd, 1911, assign its claim against the city on account of the posts to the Jamison Company. The city accepted the assignment and placed the same on file in the comptroller's office on July 6, 1911. Thereafter the West Coast Iron Works completed the posts and delivered a part thereof to the city. Afterwards, on September 16, 1911, Mabel V. McGill, the assignee of the mortgage first above noticed, brought an action to foreclose the mortgage, and in that action A. K. Isham was appointed receiver of all the assets of the West Coast Iron Works. After the receiver was appointed, the remainder of the posts were delivered to the city. There is some slight dispute whether the posts were entirely completed prior to the appointment of the receiver. If anything was done thereon by the receiver, it was insignificant, being only a part of a day's work by one man. The receiver thereupon demanded and received the warrant in payment of the posts, from the city, and collected the money

thereon, \$480. He refused to pay the Jamison Company the amount due for the iron, \$425.08.

Appellant argues that the respondent had no lien or claim upon the posts, and no right to demand that the receiver furnish the posts to the city; that the receiver, having furnished the posts, was entitled to collect the pay therefor, and that, if respondent had any claim to the proceeds, it was its duty to intervene in the action and set up its claim. There is no merit in any of these positions. It seems too plain for argument that the city warrant, or the proceeds of the contract, never became an asset of the West Coast Iron Works, because it never came into possession of the West Coast Iron Works. Their right to the warrant had been assigned and the assignment had been accepted by the city before the posts were delivered or manufactured, and long before the receiver was appointed. The respondent never claimed any lien upon the posts themselves. It rested upon its claim to the warrant, which had been assigned to it. If the receiver had not been appointed to take over the assets of the West Coast Iron Works, that company could not have reasonably claimed the warrant from the city, after the posts were delivered, because of this previous assignment. The receiver took no greater interest in the estate than the West Coast Iron Works had at the time of the appointment of the receiver. High, Receivers (4th ed.), § 440; 34 Cyc. 191, 193. This warrant had been assigned to the respondent by a valid and binding assignment, long prior to the appointment of the receiver. When the receiver demanded the warrant from the city, he had no right thereto, nor to the funds which he derived therefrom. It is true, a few of the posts were delivered to the city after the receiver was appointed and some work done upon the posts, but this was done in accord with the contract, and did not alter the right of the respondent to the warrant the right to which had previously passed, and the receiver had notice of that fact. The receiver obtained the warrant by artifice—not necessary to discuss—and wrongfully; under

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a misapprehension of his duties, no doubt but none the less wrongfully. He was bound to return it, or the proceeds by order of the court appointing him, to the person rightfully entitled to it. The procedure adopted was regular. 34 Cyc. 422; High, Receivers (4th ed.), § 299; (3d ed.), § 254b.

The judgment is therefore affirmed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 10797. Department One. March 28, 1913.]

HARRY A. JONES, *Plaintiff*, v. CLARA B. JONES, *Respondent*,
GEORGE OLSON *et al.*, *Appellants*.¹

STIPULATIONS—CONSTRUCTION—SUBMITTING MATTER TO COURT—ARBITRATION—APPEAL. A stipulation between a defendant and his attorneys, in a divorce case, made with a view of substituting other counsel, providing that the amount of their compensation shall be fixed by the judge of the trial court, submits the matter to the judge as a court and not as an arbitrator, whose decision is therefore appealable.

APPEAL—RIGHT TO APPEAL—PARTIES—ATTORNEY AND CLIENT—COMPENSATION. An order of the superior court fixing attorney's fees, pursuant to a stipulation between attorney and client that the court should fix the compensation, is appealable by the attorneys, under Rem. & Bal. Code, § 1716, subds. 1 and 6, allowing appeals by any party aggrieved by the decision.

ATTORNEY AND CLIENT—EMPLOYMENT OF ASSOCIATE—AUTHORITY—RATIFICATION. A client ratifies the employment by her attorney of associate counsel, where she knew he was actively engaged in the case, and stipulated that the court might fix his compensation.

DIVORCE—ATTORNEY'S FEES—ADEQUACY OF ALLOWANCE—EVIDENCE—SUFFICIENCY. Where a defendant in a divorce case represented to attorneys that she had been overreached in a settlement, receiving only \$125,000 from the plaintiff, who was worth over \$1,000,000, and the attorneys examined many papers, and filed an answer, cross-complaint, and a number of motions and affidavits and appeared in court three times, procuring an order for \$500 suit money, which was paid over to them, an allowance of but \$350 as attorney's fees, on sub-

¹Reported in 130 Pac. 1125.

stituting other counsel, is inadequate, and on evidence estimating the value from \$100 to \$4,000, should be fixed at \$1,000, in view of the value of the property and the services rendered (CHADWICK, J., dissenting).

Appeal from an order of the superior court for King county, Mackintosh, J., entered August 8, 1912, allowing attorney's fees, in an action for divorce. Reversed.

George Olson and Milo A. Root, for appellants.

Donworth & Todd, for respondent.

GOSK, J.—This is an appeal from an order of the superior court of King county, fixing the amount of the attorney's fees of the appellants, George Olson and Milo A. Root, for services rendered to the respondent Clara B. Jones in a divorce action between her husband and herself. The order was entered in the main action in pursuance of a stipulation filed therein. The stipulation, omitting title, is as follows:

"It is hereby stipulated and agreed, by and between the above named defendant, Clara B. Jones, and her attorneys, George Olson and Milo A. Root, that the amount of compensation due said attorneys to this date may be fixed by the judge of the above entitled court. Whereupon said attorneys are to turn over to said defendant any papers that they may have in their possession, and withdraw their appearance as attorneys for said defendant in the cause.

"Clara B. Jones, Defendant.

"George Olson,

"Milo A. Root,

"Attorneys for Defendant"

The attorneys, Olson and Root, have appealed.

The respondent has renewed her motion to dismiss the appeal, upon the grounds, (1) that the appellants were not parties to the action and hence have no right of appeal; and (2) that, under the stipulation, the judge of the superior court acted only as an arbitrator, and that his decision is final. The motion was heretofore submitted and denied without an opinion.

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The stipulation was made for the purpose of freeing certain papers which the respondent had placed in the hands of the appellants, in the progress of her suit, from the attorney's lien, and fixing their compensation in order that she might substitute other counsel, under the provisions of the code, Rem. & Bal., §§ 133 to 138. It is quite clear from the stipulation that the question of compensation was submitted to the court as a court and not as an arbitrator. The appellants' right to appeal from the order fixing their compensation is covered by the code. Rem. & Bal. Code, § 1716, subds. 1 and 6; *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902; *Slater v. Stevens County Bank*, 12 Wash. 488, 41 Pac. 168; and *McMillan v. Northport S. & Ref. Co.*, 49 Wash. 76, 94 Pac. 761. In the case first cited, an appeal was sustained from an order quashing the service of a writ of garnishment. In the second case cited, it was held that an order fixing the amount of compensation of an assignee was appealable, irrespective of the disposition of the main case out of which it sprung. In the case last cited, an appeal was entertained which involved only the amount of compensation that should be allowed counsel in a case where an emergency restraining order had been obtained, and a showing made that further prosecution of the suit upon the merits was unnecessary. The principal action was still pending on the merits when this appeal was taken. This distinguishes this case from *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. 135. The motion is denied.

Upon its merits the contention is three-fold: (1) That Judge Root was not employed by the respondent; (2) that Olson had no authority to associate him in the case; and (3) that the compensation allowed by the court is adequate for the services rendered. The first two contentions are without merit. The record shows that the respondent knew that Judge Root was actively engaged in the case in her behalf. She therefore ratified his employment made by his associate, even if she had not theretofore directed it.

Passing to the third contention, it appears conclusively that the respondent and her solicitors at Vancouver, B. C., represented to the appellants that the plaintiff husband was worth above \$1,000,000. The respondent represented to them that she had been overreached in a settlement between her husband and herself at Vancouver, British Columbia, wherein he had retained property worth \$1,000,000 or more, while she had gotten about \$125,000, and that she had good cause for divorce, and that he had no cause for divorce. Acting upon these representations, the appellants examined a great many papers submitted to them by the respondent, and had a number of lengthy conferences with her about the divorce and the property. They also prepared and filed an answer and cross-complaint, setting up the facts showing that the respondent had been defrauded in the property settlement, and setting forth her grounds for a divorce and the custody of the children, and prepared a number of motions and affidavits, and appeared in court at least three times. The purposes of the several motions and affidavits and the several appearances in court were, (a) to get an allowance for counsel fees, suit money, and alimony; (b) to get an order preserving the *status quo* of the property; and (c) to restrain the husband from harrassing the respondent pending the litigation. The court made an order in the principal case directing the husband to pay the respondent \$500 as suit money, and denied the other applications. The husband paid this sum by a check drawn in favor of the respondent, which she endorsed to the appellant Olson. She has made no other payments to the appellants.

The court allowed the appellants \$350 as counsel fees, ordered them to pay \$150 (the balance represented by the check) to the respondent, substituted other counsel, and ordered the appellants to deliver to them all papers, files, and documents in their possession relating to the action. They raise the single question of the adequacy of the counsel fees

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allowed by the court. The attorneys who testified in the case differ widely as to the value of the appellants' services. The attorneys who testified for the appellants put the value of the services at from \$1,000 to \$4,000; whilst the attorneys who testified for the respondent put the value at from \$100 to \$200. This testimony was all based upon hypothetical questions. Judge Battle, in answer to a question which fairly embraced the facts, stated that the services were worth approximately \$1,000. In view of the value of the property and the services required and rendered, we feel constrained to accept Judge Battle's estimate.

The case will be remanded with directions to the court to allow the appellants to retain the \$500 heretofore paid them, and to enter a judgment in their favor against the respondent for \$500 additional. The appellants will recover their costs.

CROW, C. J., PARKER, and MOUNT, JJ., concur.

CHADWICK, J. (dissenting)—It was never the intention of Mrs. Jones to hire Judge Root. He was employed, or rather associated by his coappellant Olson, and for his benefit. The fact that he was working out the case for Olson should not bind Mrs. Jones to pay for his services. For the services performed—considering also those unperformed—I think the compensation allowed by the lower court was ample. I therefore dissent.

[No. 10764. Department One. March 28, 1913.]

**EASTMAN & COMPANY, Respondent, v. HARRY E. WATSON
et al., Appellants.¹**

CORPORATIONS—ACTIONS—CONDITIONS PRECEDENT—PAYMENT OF LICENSE FEE—PROOF. Payment of the annual corporate license fee, which by statute is a prerequisite to suit by a corporation, may be proved by parol, notwithstanding the statutes make the certificate of the secretary of state *prima facie* evidence.

SAME. Evidence that it had been paid for the current year is *prima facie* evidence that it had been paid for previous years.

SAME—PAYMENT OF LICENSE FEE—ISSUES, PROOF, AND VARIANCE. Rem. & Bal. Code, § 3715, providing that no corporation shall commence or maintain any suit without alleging and proving that it had paid its annual license fee, is a license tax or revenue measure, and proof that the fee was paid prior to the trial although in default when the suit was commenced is admissible under an allegation that it had been paid before suit brought, without amendment of the complaint; since the purposes of the statute had been fully met.

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered May 1, 1912, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Affirmed.

Paul B. Phillips, for appellants.

Hamlin & Meier, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover upon a promissory note for \$250 and interest. The complaint alleged that the plaintiff was a domestic corporation, and had "paid its annual license fee last due to the secretary of state." The complaint then set out the note and alleged nonpayment. For answer, the defendants, upon information and belief, denied the corporate existence of the plaintiff and the payment of the annual license fee, admitted making the note, and alleged four affirmative defenses.

¹Reported in 130 Pac. 1144.

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These affirmative defenses were each denied by reply. The case was tried to the court without a jury on May 1, 1912. The president of the plaintiff company was the only witness examined. He testified that the plaintiff had paid its annual license fee. Upon cross-examination he testified, by reference to the certificate of license, that the fee was paid on February 16, 1912. The action was begun on December 23, 1911. No evidence was offered by the defendants, who rested upon an objection to the oral evidence that the license fee had been paid and that there was no evidence that the fee was paid for the year 1911. The trial court thereupon made findings of fact in favor of the plaintiff, and entered a judgment for the amount prayed for in the complaint. The defendants have appealed.

Numerous errors are assigned, but the appeal is based upon three "propositions," stated in the appellant's brief as follows:

"(1) A private corporation having a capital stock is not entitled to affirmative relief under the statutes of this state unless it allege, and, if the allegation be denied, it also prove, that at the time of the commencement of the action it had paid its annual license fee then last due to the secretary of state. (2) A corporation cannot prove payment of its annual license fee by oral proof in preference to production of the official certificate of payment issued by the secretary of state, where oral proof is objected to as being not the best evidence. (3) Proof of payment of corporation license fee must follow the pleadings, and where new issues are developed on the trial respecting time and terms of such payment they must be embodied in amendments to the pleadings or in supplemental pleadings and opposing parties must be fairly and openly apprised of such new issues or else be granted a continuance to enable them to meet the new issues."

These propositions are elaborately argued in the briefs. The second presents the question whether the payment of the annual license fee may be proved by parol. We may assume for the purposes of this case, without deciding, that the denial upon information and belief is sufficient to put the fact

of payment of the license fee in issue. We have heretofore held payment of the license fee may be proved by parol. *Richards v. Bussell*, 70 Wash. 554, 127 Pac. 198, 129 Pac. 90; *Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462. These cases are conclusive upon that question. The fact that the license fee was paid for the current year is *prima facie* sufficient to show that it was paid for the previous year, and in the absence of proof that previous years have not been paid, will be conclusive.

The first and third propositions present the question whether the action can be maintained or judgment entered for the plaintiff when the license fee was in default when the action was begun. The plaintiff admitted that the license fee due July 1, 1911, was paid in February, 1912. Appellants argue from this that the license fee was not paid at the time the action was begun in December, 1911, and that under the statute, Rem. & Bal. Code, § 3715, plaintiff could not commence the action and, without amending its complaint, could not prove that the fee was paid subsequent to the commencement of the action. The statute provides, at § 3715, *supra*:

“No corporation shall be permitted to commence or maintain any suit . . . in any court of this state, without alleging and proving that it has paid its annual license fee last due.”

In discussing this provision in *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 63 Wash. 376, 115 Pac. 855, we said:

“The license tax is a revenue measure, and the prohibiting of suits or actions on the part of corporations without alleging and proving payment of the license fee is intended as a measure to enforce the collection of the tax.”

And in *State ex rel. Preston Mill Co. v. Howell*, 67 Wash. 377, 121 Pac. 861, we said:

“These respective acts were not primarily directed against corporations; they were revenue acts pure and simple, and

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the provisions directed against corporations were for the purpose of enabling the state to enforce the payment of its revenue and not leave it to the voluntary act of the corporation."

There can be no doubt that the objects of the statute were correctly stated in these cases. If the plaintiff corporation failed to prove at the trial that its license fee has been paid, the court is required to dismiss the complaint; but where it is shown that the fee is paid at that time, the courts will not dismiss the action, because the requirement of the statute is fully met. If the action is brought when the fee is in default, the action may be abated, upon proper showing, until the fee is paid. If no showing is made, the defendant waives the question. *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031; *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605. But after the fee is paid, though tardy, the corporation is restored to its right to maintain actions. The amendment of the complaint was therefore unnecessary. Judgment affirmed.

CROW, C. J., GOSE, PARKER, and CHADWICK, JJ., concur.

[No. 10720. Department One. March 28, 1913.]

M. FLETCHER, *Appellant*, v. MURRAY COMMERCIAL COMPANY,
Respondent.¹

STATUTES—FOREIGN LAWS—PRESUMPTIONS. In the absence of allegation, it will be presumed that the bankruptcy laws of a foreign country are the same as our own.

RECEIVERS—TEMPORARY RECEIVERS—ACTIONS—CAPACITY TO SUE. A temporary or *ad interim* receiver in bankruptcy, not being vested with the title to the estate of the alleged bankrupt, cannot maintain an action on behalf of the estate, in the absence of a showing that the property sought is in danger of being dissipated; and hence has no capacity to sue on mere choses in action or for unliquidated damages.

¹Reported in 130 Pac. 1140.

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered September 14, 1912, dismissing an action by a receiver in bankruptcy, on a contract of the insolvent, upon sustaining a demurrer to the complaint. Affirmed.

Douglas, Lane & Douglas, for appellant.

Jessie A. Frye, for respondent.

MOUNT, J.—This appeal is from an order of the lower court sustaining defendant's demurrer to the amended complaint. Plaintiff elected to stand upon the allegations of the amended complaint. The action was dismissed. Plaintiff appeals.

The complaint alleges:

"That the plaintiff is the trustee and official and interim receiver of the estate of Dady Burjor & Co.; that said Dady Burjor & Company was, during all the time herein mentioned, a co-partnership consisting of D. S. Dady Burjor and Frederick Charles Mow Fung; that on the 17th day of June, 1911, the plaintiff was duly appointed official and interim receiver in bankruptcy of the estate of said co-partnership by the supreme court of Hong Kong, China, in cause No. 21 of 1911 in Bankruptcy in said court *in re* Dady Burjor and Company, debtors, *ex parte* Wong Chung, petitioning creditor; and duly qualified as such receiver, and is now the duly qualified and acting official and interim receiver and trustee of the estate of said copartnership; that said court was and is a court of competent jurisdiction exercising general jurisdiction in bankruptcy in said District of Hong Kong. That as such official and interim receiver and trustee the plaintiff secured and is vested with the title to all the assets of said co-partnership; that plaintiff was directed by said court to institute this action. That this action does not involve or affect the rights of any local or domestic creditor."

The complaint then sets up three causes of action, to the effect, first, that Dady Burjor & Company in 1909 entered into a contract with the defendant, by which it was agreed that an agent should be sent to Shanghai, to solicit orders

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for certain goods manufactured in England; that these parties were to share the expenses and profits equally; that defendant was to finance the business by letters of credit; that the agent was sent as agreed and obtained certain orders for goods; that the defendant thereafter refused to secure the letters of credit, and refused to pay any part of the expenses of the agent; that Dady Burjor & Company were damaged thereby in the sum of \$1,000. For a second cause of action the complaint alleged that, between November, 1907, and May, 1911, Dady Burjor & Company sold goods in China for defendant upon commission, and advanced money for defendant amounting to \$2,584.05; that there is a balance due thereon amounting to \$891.80. For a third cause, it is alleged, that it shipped certain lumber to said Dady Burjor & Company in China, to be sold upon commission on account and at the risk of the defendant; that Dady Burjor & Company advanced the freight charges and the charges for storing and caring for such lumber for defendant, in the amount of \$1,239; that on account of the inferior quality of said lumber the same was unsalable except at a great loss; that defendant has refused to reimburse the said Dady Burjor & Company.

The trial court sustained the demurrer to the complaint upon the ground of want of capacity in the plaintiff to sue in this jurisdiction. The respondent makes three points against the complaint, as follows: (1) An interim receiver in bankruptcy has no legal capacity to sue in courts other than those of his appointment; (2) the bankruptcy laws of a foreign country do not operate as a transfer of property located in the United States; (3) a receiver has no extra-territorial jurisdiction or power of official action. Our view upon the first of these points renders a discussion of the other two unnecessary.

The complaint alleges,

“That on the 17th day of June, 1911, plaintiff was duly appointed official and interim receiver in bankruptcy of the

estate of such copartnership by the supreme court of Hong Kong, China, . . . and duly qualified as such receiver, and is now the duly qualified and acting official and interim receiver and trustee of the estate of said copartnership."

The bankruptcy law of the District of Hong Kong, China, is not pleaded, and we are not informed that the bankruptcy law of that district is different from the bankruptcy law in the United States. In the absence of such information, we must presume that such law is the same there as it is here. *Daniel v. Gold Hill Mining Co.*, 28 Wash. 411, 68 Pac. 884. The law here "authorizes bankruptcy courts to appoint receivers or the marshals, in certain cases, to take charge of and preserve the estate." 5 Cyc. 246.

"Courts of bankruptcy may appoint receivers upon the application of parties in interest to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified, if they find it absolutely necessary for the preservation of the estates." 5 Cyc. 270.

Such receivers are merely temporary or interim. They are not vested with title to the estate of the alleged bankrupt, but hold the property merely to preserve the subject-matter of the action [Collier, Bankruptcy (1st ed.), p. 32], and they have no extraterritorial powers. *In re Benedict*, 140 Fed. 55; *In re Rubel*, 166 Fed. 131. The allegation in the complaint, that the plaintiff is the "acting official and interim receiver and trustee," can mean no more than a mere temporary officer in bankruptcy, because the duties of receiver cease upon the qualification of the trustee. 5 Cyc. 270.

Conceding that the temporary receiver of the property may, before the selection and qualification of the permanent trustee, proceed to take the property of the alleged bankrupt in a foreign country, there must be some showing that the property sought is in danger of being dissipated. There is no such showing here, for it appears that the items sought are mere choses in action, and two of them, at least, unliqui-

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dated damages which cannot be lost except by the insolvency of the defendant.

We are of the opinion, therefore, that the interim or temporary officer has no right to maintain the action, even though we should conclude that a permanent trustee might do so. The judgment is therefore affirmed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 10841. Department Two. April 1, 1913.]

BELKNAP GLASS COMPANY, *Appellant*, v. DANIEL KELLEHER
*et al., Respondents.*¹

TRIAL—OBJECTIONS — DEMURRER ORE TENUS — DECISION. Defendants have the right to rest upon a demurrer *ore tenus* on the ground that the complaint does not state sufficient facts, even after issue joined by answer; and the court may defer ruling thereon, and sustain the demurrer at the close of the evidence, if proof of the necessary facts be not produced.

MECHANICS' LIENS—FORECLOSURE—RELATIONSHIP—ALLEGATION AND PROOF—NECESSITY. The complaint or proof in an action to foreclose a materialman's lien must show the relationship between the owners of the property and the persons ordering or contracting for the materials furnished, under Rem. & Bal. Code, § 1129, requiring that the materials be furnished either at the instance of the owner, or his agents or contractors, architects, builders, or persons having charge of the construction.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered August 21, 1912, dismissing an action to foreclose a materialman's lien, on sustaining a demurrer *ore tenus*. Affirmed.

Gates & Emery, for appellant.

Bausman & Kelleher, for respondents.

FULLERTON, J.—The appellant brought this action against the respondents, Kelleher and Whittlesey, and others,

¹Reported in 130 Pac. 1123.

to foreclose a materialman's lien. Issue was taken on the complaint and a day fixed for the trial. On the day appointed, the parties appeared, whereupon the respondents, Kelleher and Whittlesey, entered an objection in the form of a demurrer *ore tenus* to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and announced that they would stand on their objection, and not participate in the trial of the cause. The court, without passing on the objection, proceeded to trial on the issues made by the answers of the other defendants. At the conclusion of the trial, the court sustained the objection of the respondents and entered a judgment in their favor denying a foreclosure of the lien, and dismissed the action as to them. The record in this court does not disclose what disposition was made of the action as to the other defendants, although it appears from the statement of facts that the court announced at the conclusion of the trial that it would deny a foreclosure as to all of the defendants, and allow a personal judgment for the amount claimed to be due against the defendant James Duffy. This appeal is taken from the judgment of dismissal entered in favor of Kelleher and Whittlesey.

In this court complaint is made of the procedure followed by the trial court. It is claimed that it was error to allow an objection to the sufficiency of the complaint after issue had been joined by answer, and error to take the objection under advisement until the close of the evidence. But the respondents had the right to rest their defense on an objection to the sufficiency of the complaint, if they so desired, even after answer filed, and this is all they did do in effect. The conduct of the respondents in this regard was a matter entirely without the control of the court. Moreover, no right of the appellant was affected by the action of the court. The appellant was at liberty, notwithstanding the withdrawal of the respondents, to go on with its case, and prove a cause of action against them if it could. If it succeeded in its proofs,

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and the court should hold its complaint defective, its right to amend would not be affected by the absence of the respondents; on the contrary, it could amend its complaint to correspond with its proofs and take judgment against them as if they were personally present.

The complaint was clearly defective. It was alleged "that on the 14th day of September, 1911, plaintiff at the special instance and request of James Duffy and Kohler & Chase, a corporation, commenced to furnish material and perform labor, which material was used, and which labor was performed in and about the construction and alteration of a certain building or structure on the premises hereinabove described, which material was of the reasonable value, &c.," but there was no allegation of the relation of James Duffy or Kohler & Chase to the owners of the property; that is to say, there was no allegation that they were the actual agents of the owner of the property, or were contractors, subcontractors, architects, builders or persons having charge of the construction of the building on which the lien is claimed. Persons standing in one or the other of these relations to the owner are the only persons that can lawfully bind his property for materials or labor used in the construction or alteration of a building thereon; and a complaint, if it be not subject to demurrer, must set forth that the materials and labor for which the lien is claimed were furnished either at the instance of the owner or some person bearing this statutory relationship to the owner. Rem. & Bal. Code, § 1129; *Canal Lum. Co. v. Kong Yick Inv. Co.*, ante p. 437, 130 Pac. 492.

The defects in the complaint, however, were amendable, and we have searched the evidence for the purpose of ascertaining whether or not the proofs offered at the trial supplied the defects, but the evidence on this question is as much barren as the complaint. The proofs were directed to a showing of the value of the materials furnished, and there is not even an indirect reference to the matter now under in-

quiry. Since it was necessary to allege that the person ordering the materials and hiring the labor bore to the owner of the structure being altered or constructed the relation of agent as defined by the statute, it was also necessary, in order to support a recovery, to prove such fact; and there being no such proof, the judgment must stand affirmed. It is so ordered.

CROW, C. J., MAIN, MORRIS, and ELLIS, JJ., concur.

[No. 10909. Department Two. April 1, 1913.]

FIRST NATIONAL BANK OF RITZVILLE, *Respondent*, v.
W. R. CUNNINGHAM, SENIOR, *as Executor etc.*,
Appellant.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—EXECUTORS AND ADMINISTRATORS—CLAIMS—COMMUNITY DEBTS. Upon the death of the wife, a judgment recovered against the husband alone on a community debt is properly established as a claim against the estate of the community.

EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTMENT—DEATH PENDING SUIT—HUSBAND AND WIFE. Rem. & Bal. Code, § 1481, providing that if any action be pending against the deceased at the time of his death, the plaintiff shall present his claim for allowance, and no recovery shall be had in the action unless proof be made of the presentment, has no application to an action against a husband alone on a community debt, whose wife died pending suit; since the plaintiff had a right to a judgment against the husband binding his separate estate, and since the wife was not a party to the suit.

Appeal from a judgment of the superior court for Adams county, Kauffman, J., entered May 28, 1912, in favor of the defendant, in an action upon a claim against an estate, after a trial to the court. Affirmed.

Walter Staser and C. H. Spalding, for appellant.

Lovell & Davis, for respondent.

¹Reported in 130 Pac. 1148.

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Opinion Per MORRIS, J.

MORRIS, J.—Appeal from a judgment establishing as a proper claim against the estate of a deceased wife, a judgment obtained in an action against the husband alone upon a community indebtedness. The respondent first brought an action against the husband upon two promissory notes, without making the wife a party. Pending this action, the wife died. The action proceeded to judgment. This judgment is admitted to be a community judgment. Respondent then filed the judgment as a claim against the community in the estate of the deceased wife. It was rejected, and this suit was brought thereon, resulting in the judgment appealed from.

These facts support the judgment so clearly that it is difficult to find anything to discuss without again opening up the long-ago settled law of this state. When the wife died, the entire community estate was subject to administration, and all community debts were proper claims against that estate. The judgment against the husband, being a community judgment, was properly filed as a claim against the community estate, such a judgment being enforceable out of the separate property of the husband or the community property. *Oregon Imp. Co. v. Sagmeister*, 4 Wash. 710, 80 Pac. 1058, 19 L. R. A. 233; *Curry v. Catlin*, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101; *McDonough v. Craig*, 10 Wash. 239, 38 Pac. 1034; *Ryan v. Fergusson*, 3 Wash. 356, 28 Pac. 910; *In re Hill's Estate*, 6 Wash. 285, 33 Pac. 585. That this is the law is admitted by appellant, his contention being that, under Rem. & Bal. Code, § 1481, providing that:

“If any action be pending against the testator or intestate at the time of his death, the plaintiff shall, in like manner, present his claim to the executor or administrator for allowance or rejection, authenticated as in other cases; and no recovery shall be had in the action, unless proof be made of the presentment;”

the wife having died during the pendency of the first action, and by her death subjected the entire community estate to

administration, respondent should have abandoned the first action, and presented a conceded community indebtedness as a claim against the community estate, and not having done so, all rights of enforcement against the community estate have been lost. This contention overlooks the fact that, the husband alone having signed the note, it became, when established as a just claim, not only a presumptive community indebtedness, but one enforceable against the separate estate of the husband, and no law required respondent to abandon his pursuit of the separate estate of the husband in order to establish the claim against the community estate. Respondent had a right to proceed to judgment against the husband; and the community character of the indebtedness being admitted, that judgment became a lien both on the separate estate of the husband and the community estate.

Neither do we think that the wife is within the description of the statute. No action was pending against her at the time of her death. There was no attempt to subject her separate property to any claim of respondent. All that was sought in that first action was to obtain a judgment against the husband, which judgment is, not only presumptively but admittedly, a claim against the community estate. As such it is properly enforceable against the community estate, and the judgment so holding is affirmed.

CROW, C. J., ELLIS, FULLERTON, and MAIN, JJ., concur.

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[No. 11076. Department Two. April 1, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Philip R. Waughop, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.¹

MARRIAGE—ANNULMENT—POWER OF COURTS—CONSTITUTIONAL LAW—CIVIL RIGHTS—INFRINGEMENT. The superior court has no power, in an action for the annulment of a marriage, to order the parties to meet for a conference, with a view to adjusting their differences, as it would be an infringement of personal rights.

INJUNCTION—NOTICE—EX PARTE APPLICATION. A court cannot, on *ex parte* application, issue an order for parties litigant to meet, inasmuch as its effect is to issue a final injunction without notice.

Application filed in the supreme court March 10, 1913, for a writ of prohibition to the superior court for King county, Everett Smith, J., to prevent the enforcement of an order requiring plaintiff to meet the defendant. Granted.

Walter A. Keene, for relator.

Thomas A. Mead, for respondent.

MORRIS, J.—Relator and his wife, Nellie Waughop, were married February 4, 1913. A few days thereafter, relator commenced an action to annul the marriage upon the ground that, at the time it was contracted, he was mentally incompetent and suffering from the effects of certain drugs. On February 19, 1913, on the *ex parte* application of relator, the respondent judge issued an order, enjoining the wife from visiting or entering the residence of relator, or molesting or in anywise interfering with, or going about, the relator or his mother, with whom he was residing. The wife then appeared and contested this order and the power of the court to make it. Some sort of hearing was had, the nature of which is not disclosed in the record before us, at which time the court suggested a meeting of the husband and wife, ac-

¹Reported in 130 Pac. 1139.

accompanied by their attorneys, for the purpose, evidently, of ascertaining whether the relator was bringing the action of his own free will or, as evidently suggested to the court by the wife, acting under the influence of others. The wife was dissatisfied with the result of this meeting, and through her counsel gave oral notice to counsel for relator that application would be made to the court to fix the time and place for a second meeting. Counsel for relator, claiming lack of sufficient notice, refused to attend upon the court; and on the application of the wife, the court made an order directing the parties to appear at the office of a certain physician on March 10, accompanied only by their respective attorneys, for the purpose "of talking over their affairs." Counsel for relator thereupon came to this court and made application for a writ of prohibition, to prevent the court below from enforcing this last order. Upon this application, a show-cause order was issued, upon the return of which respondent judge filed his return, and the matter was submitted to this court for final determination.

The writ as prayed for must issue. The trial court has no power or authority, in an action of this character pending before him, to order the parties to meet in the hope of bringing about an amicable adjustment of their differences. As to whether a trial court should suggest such a meeting is a personal matter for each judge to determine for himself, but when he goes beyond that and issues the solemn mandate of the court compelling parties to submit thereto or subject themselves to possible punishment for a refusal to obey, he goes beyond any authority vested in him by the law. The law will not uphold nor sanction such an infringement upon personal rights. Although the order of February 19 is not before us for review, we think it proper to say that this order was issued without legal warrant. So far as the private rights of parties litigant are concerned, there is no distinction between an action for the annulment of a marriage and any other equitable proceeding involving the rights of

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the parties to do or not to do a certain thing. If, on a proper showing, a trial court is satisfied that there is grave danger of interference with personal or property rights, an *ex parte* restraining order may be issued upon the application for a show-cause order, upon the return day of which the matter may be determined after full notice and opportunity to guard the rights of the respective parties. But no court has the power to issue a final injunction—which was the effect of the order of February 19—upon an *ex parte* application. If this wife believed that relator was acting under restraint and duress when he commenced his action to annul the marriage, the law provides a simple way to bring him into court to have that fact judicially determined, with proper safeguards for the rights of all parties. The question submitted by this application seems so plain to us that we refrain from further discussion.

Let the writ issue.

Crow, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 10784. Department One. April 1, 1913.]

HENRY DAVIES, *Respondent*, v. WILLIAM CAREY *et al.*,
Appellants.¹

FRAUDS, STATUTE OF—ORAL PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL UNDERTAKING—CONSIDERATION. Where the owner of timber sold the same to a logger, to be paid for as removed, and was interested in the logging operations to the extent that his profits depended thereon, his promise to a merchant, supplying the logger with goods for the camp, to pay the balance due on the account and also to pay for all merchandise thereafter furnished, in case credit was extended and goods supplied for the operations, is a direct and original undertaking on a sufficient consideration and not a promise to pay the debt of another; and hence is not within the statute of frauds.

¹Reported in 130 Pac. 1137.

HUSBAND AND WIFE—COMMUNITY DEBTS—JUDGMENT—FORM. In an action against a husband and wife upon a community debt contracted by the husband alone, a judgment in form against both husband and wife, is erroneous, since it is enforceable against the wife as her separate debt, and should be against her as a member of the community only.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 14, 1912, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Modified.

Peterson & Macbride, for appellants.

Jas. W. Carr, for respondent.

PARKER, J.—The plaintiff, a storekeeper at Port Orchard, in Kitsap county, seeks to recover from defendants the value of merchandise delivered by him to Harris Brothers, who were at the time engaged in logging operations in that county under a contract with the defendant William Carey. The plaintiff rests his right to recover from the defendants upon the promise of the defendant William Carey to pay for the merchandise so delivered. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff for the full amount claimed, from which the defendants have appealed.

In the early summer of 1910, appellant William Carey was engaged in logging, in Kitsap county, having acquired certain standing timber there which he was to pay for from time to time as he removed it from the land. In June of that year he entered into a contract with Harris Brothers, by which they were to take over his outfit and log this timber in his stead, and pay him therefor from time to time as the logs were removed and marketed. Respondent was aware of the fact that both Carey and Harris Brothers were interested in the logging of this timber, but did not know of the real nature of the contract they had with each other relative thereto. The evidence tends to show that respondent had

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good reason for believing, and did believe, that Harris Brothers were employed by Carey to remove the timber, though it appears that they actually had a contract for the purchase of the timber from Carey on such terms as to leave him a profit. It is, in any event, plain that Carey was interested in the success of Harris Brothers in removing and marketing the logs, and that his profits depended thereon.

Between July 14 and August 19, 1910, respondent sold and delivered to Harris Brothers merchandise consisting of the usual supplies and provision for carrying on logging operations, of the total value of \$438.10. During this period Harris Brothers paid to respondent thereon \$150, leaving a balance of \$288.10 due on August 19. On August 20, appellant William Carey and respondent had a conversation at his store relative to this unpaid balance due him from Harris Brothers. Respondent's version of this conversation and what he then did as a result thereof is given in his testimony as follows:

"A. At that time I told Mr. Carey that I was a small concern, that the account of the camp was getting almost too large and that I had to have money to pay my bills, and he said to me that he was going to take over the camp and would pay the bills. Q. What else did he say, if anything? A. And I asked him if I should still continue to supply the camp and he told me yes, to let them have what goods that they wanted, and that he would not only pay for what went down but pay for what they had got. Q. What, if anything, did he say with reference to charging the account to him? A. He said, charge the account to him, sir, which I did. Q. About the balance due, what did he say about charging it? A. Charging the whole thing. I handle the McKaskey system, one account is brought right forward onto the other. Q. What did he say, if anything, about charging the balance that was due? A. He told me to charge balance to him, the whole account; that he would become responsible for the whole account. Q. You may state, Mr. Davies, whether at that time you made any memorandum of the agreement between you and Mr. Carey. A. I certainly did; I went right

in and called Mrs. Dilks' attention to the fact, made the notation on what I called my daily balance."

This testimony of respondent is corroborated by another disinterested witness who was present at the time, though it was denied by Carey. The slips upon which respondent noted his charges against and in favor of his customers from time to time, constituting his book of original entry, kept in due course of business, show that this balance was then charged by him thereon against appellant William Carey. Thereafter respondent continued to deliver goods to Harris Brothers at their request from time to time, and as delivered charged the goods to appellant William Carey until September 19, at which time there was due upon the account the total sum of \$404.95, no payments having been made since August 20, the day of the conversation between respondent and appellant William Carey. About this time, appellant William Carey took possession of the camp and outfit which had been previously turned over by him to Harris Brothers, evidently for the reason that Harris Brothers had failed to carry on the logging operations as agreed under their contract.

It is first contended on behalf of appellant that the evidence does not warrant the finding of the trial court, to the effect that appellant William Carey promised to pay the balance due respondent from Harris Brothers, and also to pay for the goods thereafter to be furnished to Harris Brothers, as testified to by respondent. A careful reading of the entire evidence convinces us, however, that it clearly preponderates in support of the version of that conversation given by respondent in his testimony, which we think shows a direct original promise on the part of Carey to pay the previously incurred debt of Harris Brothers as well as the debt thereafter to be incurred in the furnishing of goods, as his own debt.

It is contended that the promise of appellant William Carey to respondent was in any event only a "promise to

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answer for the debt, default, or misdoings of another," and therefore void and not enforceable because not evidenced in writing as required by our statute of frauds. Section 5289, Rem. & Bal. Code. We think this contention finds its answer in the fact that the promise was not collateral, but was a direct promise on the part of Carey to pay both the past debt incurred by Harris Brothers as well as the future debt to be incurred upon furnishing them goods, as his original debt. It was not a mere promise to pay if Harris Brothers failed to pay, but it was manifestly a direct promise on the part of Carey to assume and pay for all of the goods as his own debt. This being true, there is nothing wanting to render appellant William Carey liable thereon, unless it be a lack of sufficient consideration to support and render that promise binding in law. William Carey's interest in the logging operations and the fact that his prospective profits depended upon the logging operations being carried on, we think leave little to be argued upon the question of the sufficiency of the consideration moving to Carey, to support his promise as a legal liability on his part. From all the circumstances, it is clearly manifest that the primary purpose of Carey was to secure and promote his own interest. This, we think, was sufficient in law as a consideration, even though the result of his promise to respondent was to incidentally answer for a debt of Harris Brothers. *Burns v. Bradford-Kennedy Lum. Co.*, 61 Wash. 276, 112 Pac. 359; *Howell v. Harvey*, 65 W. Va. 310, 64 S. E. 249, 22 L. R. A. (N. S.) 1077, and note. See note in 15 L. R. A. (N. S.) 222; 20 Cyc. 168.

Appellants rely upon the early decision of this court in *McKenzie v. Puget Sound Nat. Bank*, 9 Wash. 442, 37 Pac. 668, 43 Am. St. 844. A careful reading of that decision, we think, will show that there was no consideration whatever moving to the promisor. It is apparent from the language of that decision that, had there been a consideration operating to the

advantage of the promisor, it would have been held sufficient to render the promise legally binding.

Appellants also rely upon our recent decision in *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60. That case, however, involved the construction of the language of the complaint, which was somewhat involved; the court concluding that the alleged promise was collateral, being a promise of indemnity only.

The judgment is:

"That the plaintiff have and recover of and from the defendants herein and each and every of them, to wit, William Carey and Jessie Carey,"

It is contended in behalf of appellant Jessie Carey that the judgment is, in any event, erroneous in so far as it awards recovery against her individually, or otherwise than as a member of the community. We think it is quite plain from the record that the debt upon which the judgment rests is a community debt for which she is not liable beyond her interest in the community property. It was therefore error to enter the judgment in this form rendering her separate property liable therefor. *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777; *White v. Ratliff*, 61 Wash. 383, 112 Pac. 502.

The judgment is reversed in so far as it awards recovery against appellant Jessie Carey otherwise than as a member of the community. The judgment is affirmed in so far as it awards recovery against appellant William Carey and the community. The superior court is directed to correct the judgment accordingly. Respondent is awarded his costs in this court against appellant William Carey and the community. Appellant Jessie Carey is awarded her costs in this court against respondent.

Crow, C. J., Gose, Chadwick, and Mount, JJ., concur.

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[No. 10682. Department One. April 1, 1913.]

E. C. SCHUMACHER *et al.*, Respondents, v. JOHN J. BRAND
et al., Appellants.¹

WATERS AND WATER COURSES—EASEMENTS—GRANT BY IMPLICATION—IRRIGATION DITCH. Where the owner of irrigated land sold part of the tract, after he and his predecessors in interest had created and continuously used a ditch across the land retained, which was reasonably necessary for the beneficial use and enjoyment of the land sold as an outlet for waste water accruing from the irrigation thereof, the grantees take an easement in the land retained for the maintenance of the ditch, as located at the time of their conveyance.

SAME — ABANDONMENT — INTENTION — EVIDENCE — SUFFICIENCY. Abandonment of a waste ditch to carry off surplus water in irrigating land is a matter of intention, and is not shown by the fact that the owners of the dominant estate permitted the owners of the servient estate to temporarily change the course of the ditch for a period of two or three years, the changed location still subserving the purposes of a waste ditch.

SAME. An easement in the maintenance of a ditch for irrigation is not lost by the fact that other parties were allowed to make use of it.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered February 20, 1912, upon findings in favor of the plaintiffs, in an action for an injunction. Affirmed.

W. A. Funk, for appellants.

Luhman & Clark, for respondents.

Gose, J.—The plaintiffs seek to enjoin the defendants from obstructing or otherwise interfering with an alleged waste ditch across the land of the latter. The plaintiffs base their claim upon the ground of an implied easement. The court adjudged that the plaintiffs had an easement or right of way for the waste ditch across the defendants' premises, entering on the north side thereof, at a point "about 90 feet

¹Reported in 130 Pac. 1145.

east of the northwest corner thereof, and running thence southwesterly across said defendants' premises, and leaving the same at a point about 90 feet south of the said northwest corner thereof;" and enjoined the defendants from interfering with the ditch. The defendants have appealed.

The appellants and the respondents each own a ten-acre tract of arid land in Yakima county. The tracts adjoin, the appellants' tract lying south of the respondents' tract. The facts found by the court, material to a consideration of the appeal, are: That from February, 1905, to June, 1906, one Newbill and his wife were the owners of both tracts; that in June, 1906, they sold the ten-acre tract now owned by the respondents to one Arpke, retaining the remainder of said tract; that during their ownership, the Newbills irrigated and farmed the entire tract, and disposed of the waste water incident to the irrigation of the tract now owned by the respondents through the ditch described in the decree; that the ditch was constructed along a natural draw which formed a natural drain for the respondents' land; that the ditch had been used by the respondents and their predecessors in title for seventeen years last past; that it was so used when the Newbills conveyed to Arpke; that Arpke and his successors in title, including the respondents, continued to use it until it was obstructed on the 16th day of May, 1911; that the Newbills continued to own the south ten-acre tract until May, 1907, when they sold and conveyed it to the appellants; that the respondents acquired, and now hold, title through mesne conveyances from Arpke; that during their ownership they have disposed of the waste water accruing from the irrigation of their land through the ditch; that it has at all times been and "now is necessary as an outlet for the waste water accruing from the irrigation of the plaintiffs' premises and for the beneficial use and enjoyment thereof, and that the said plaintiffs have no other outlet for said waste water."

These findings are supported by a decided preponderance of the evidence except in one particular; that is, that in 1908

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or 1909 the appellants changed the waste ditch, causing it to enter upon their land at the northwest corner, thence continuing along and upon the west line thereof, where it remained until the month of May, 1911, when they obstructed it, thus throwing the waste water upon the respondents' land, whereupon the respondents caused the old waste ditch to be opened. The evidence shows that the ditch followed the course found by the court at the time the appellants purchased their land; that it was plainly marked upon the ground so as to be visible to casual observation, and that it remained in use until changed by the appellants as we have stated. The respondents acquired title to their tract in the spring of 1910. The ditch is a necessary outlet for carrying off the waste water incident to the irrigation of the respondents' land. From the point where the ditch enters upon the appellants' premises it extends in a southwesterly course about a half mile, where it discharges into the Yakima river. As early as 1902 one Mahan, being then the owner of both tracts, opened the ditch across the land now owned by appellants, and used it as a waste ditch until he sold both tracts to Newbill in February, 1905.

"If the owner of land has artificially created upon the property a condition which is favorable to one portion of his property, and then sells that portion, the grantee will take it with the right to have the favorable condition continued. . . . Upon the severance of a heritage a grant will be implied of all those continuous and apparent easements which had been, in fact, used by the owner during the unity, though they had then no legal existence as easements; and a continuous easement is one to the enjoyment of which no act of the party is necessary—such as . . . a water course, whether natural or artificial. . . . The rule includes drains for closets, cesspools, and vats, as well as surface drains." 3 Farnham, Waters and Water Rights, § 831.

"All easements of whatever class which pass by implication or construction of law must not only be reasonably nec-

essary and apparent, but also permanent in their character." 14 Cyc. 1168-d.

"In some cases it is held that easements will not pass by implication except in cases of strict necessity. But the weight of authority sustains a rule less exacting than that of strict and indispensable necessity, namely, that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. . . ." 14 Cyc. 1171.

The view that a reasonable necessity will support an implied easement is supported by the following authorities: *Powers v. Heffernan*, 233 Ill. 597, 84 N. E. 661, 122 Am. St. 199, 16 L. R. A. (N. S.) 523; *German Sav. & Loan Soc. v. Gordon*, 54 Ore. 147, 102 Pac. 736, 26 L. R. A. (N. S.) 331. Other cases hold that the controlling inquiry is whether the easement "is beneficial to and adds to its value for use and will continue to do so in the future." *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182; see also note to *Rollo v. Nelson*, 26 L. R. A. (N. S.) 315 *et seq.* It is not necessary for the purposes of this case to determine which is the better rule, because as we have said, the record discloses that the waste ditch is reasonably necessary to the enjoyment of the respondents' estate.

The appellants contend that the respondents cannot assert the right to an easement in the waste ditch, because, at the time they purchased their land, it was not at the point established by the decree of the court. They knew, however, that it had been located at that point and used as a waste ditch for years and until temporarily changed by the appellants. Moreover, the appellants took title to their land as it was when they purchased. *Tooth v. Bryce, supra.*

The appellants further insist that the right to have the waste ditch at its present location has been lost to the respondents by abandonment. Abandonment is a question of intention. The mere fact that the owners of the dominant estate permitted the appellants, for their own convenience, to temporarily change the course of the ditch for the period

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of two or three years, from one point on their land to another on the same tract, and so as to still subserve the purpose of a waste ditch, is far from showing an intention to abandon.

An argument is made to the effect that the respondents have lost their right to the waste ditch because other parties are using it. The question here is, what are the respondents' rights? The rights of the other parties are not before us. *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. 952. The appellants have cited authorities upon the questions of "a way of necessity," and an implied reservation of a way in favor of the grantor. It is not necessary to review these authorities. They would only confuse the issue. The courts generally hold that there is a difference between an implied reservation of an easement and the grant of an easement by implication. The distinction is put upon the ground that the former is in derogation of the deed and its covenants, and stands upon narrower ground than a grant.

Judgment is affirmed.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10774. Department One. April 1, 1913.]

JOHN J. BRAND *et al.*, Appellants, v. AUGUST LIENKAEMPER *et al.*, Respondents.¹

WATERS AND WATER COURSES—EASEMENTS—PRESCRIPTIVE RIGHT—COMMON USE. An easement for the maintenance of a waste ditch, as an outlet for surplus water used in irrigation, which passes by implication by a conveyance of the dominant estate, is established by prescription, where it appears that there has been continuous, uninterrupted use, along a uniform route, adverse to the owner, while he was able in law to assert and enforce his rights, the use being for irrigation; and it is immaterial that the use was common with others.

SAME—CONTINUOUS USE. Whether such a use was continuous depends upon whether it was used at such times as it was needed.

¹Reported in 130 Pac. 1147.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered December 4, 1911, upon findings in favor of the defendants, in an action for an injunction. Affirmed.

W. A. Funk, for appellants.

Luhman & Clark, for respondents.

GORE, J.—The single question presented by this appeal is, whether the respondents have acquired an easement by prescription to flow waste water over the premises of the appellants. The court found in favor of the respondents. The respondent Lienkaemper owns a tract of land lying immediately east of the lands of the appellants. A public road has been laid out between the two tracts. The respondent Arpke owns a tract of land immediately to the east of the Lienkaemper tract. Arpke acquired title in 1906. Lienkaemper acquired title in 1905. The appellant acquired title in 1907. The lands of all the parties are arid, and are made productive by means of artificial irrigation. The testimony shows that a natural drain, beginning upon the lands of Arpke, extends through the lands of Lienkaemper and thence through the lands of the appellants, taking a northwesterly course and flowing off their lands at a point near the northwest corner of the same. The testimony also shows that this drain has been used as a ditch for conveying the waste water from the premises of the respondents across the premises of the appellants, thence in a general southwesterly direction for a distance of a half a mile to the Yakima river, since 1893; that during all that time this right has been exercised by the respondents and their predecessors in title, openly, exclusively, continuously, and adversely.

The appellants contend that there can be no tacking of possession, because the easement was not included in the respondents' deeds. It suffices to say that the prescriptive right which began in 1893 was complete when the respondents acquired title, and that the easement passed by implication by

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a conveyance of the dominant estate. *Schumacher v. Brand*, ante p. 543, 130 Pac. 1145.

The record discloses all the elements of a prescriptive right to use the waste ditch. It was shown that the use has been continuous, uninterrupted, adverse to the owner of the land over which the way is claimed, with the knowledge of the owner while he was able in law to assert and enforce his rights, and that the use has continued over a practically uniform route. This creates a prescriptive title. *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777; 14 Cyc. 1148, 1149.

It appears from the record that, in the irrigation of arid lands, waste ditches for the disposition of the surplus water are as necessary as the irrigation itself.

The testimony shows that the appellants at times used the waste ditch in common with the respondents for the purpose of disposing of their waste water. The appellants argue that a user in common with others never ripens into an easement. As we have already said, the prescriptive right to the easement was complete before the appellants acquired title. Moreover, where an easement is appurtenant to an estate, it may be used by all persons having a lawful right to enjoy it. 14 Cyc. 1208-9; *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. 952; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569. As was said in the *Hart* case:

“It can coexist with a right in the defendant or any one else to use the same waterways, so long as such use does not restrict or interfere with the right owned by the plaintiff.”

The controlling question is, Do the respondents own the easement? If so, it is immaterial that others may also have a right to use it.

It is contended that the waste ditch was shifted from place to place by the appellants as their convenience required, and that therefore no right attached in the respondents. This has been sufficiently answered in what we have already said. It may be further remarked, however, that the testimony shows that the ditch has continued since 1893 through a

natural depression in the appellants' land, with no appreciable change of course.

An argument is made that the use has not been continuous. The rule is that, where one uses a waste ditch at such times as he needs it, the law regards the use as continuous. The sufficiency of the continuity must depend largely on the nature of the use. *Hesperia Land & Water Co. v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. 209.

It is also argued that the respondents have recently acquired additional water rights. The court found, and the evidence shows, that there has been no appreciable change in the quantity of waste water.

The judgment is affirmed.

Crow, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10819. Department One. April 1, 1913.]

WILLIAM J. HAMMONS *et al.*, Respondents, v. J. J. SETZER, Appellant, LOUIS E. WATTAM *et al.*, Defendants.¹

MASTER AND SERVANT—RELATION — EXISTENCE OF AGENCY — EVIDENCE—QUESTION FOR JURY. The question of the agency of an employee of the owner of a grocery store, rendering the employer liable for injuries sustained when the employee, driving an automobile delivery truck, ran into and injured a pedestrian, is for the jury, where it appears that the automobile started out on a demonstration trip in charge of the selling agent, to make a delivery of groceries, and there was evidence that the grocery man instructed the agent to show the employee how to run the machine, and "all about it," as he was "the man who would run it" if purchased (MOUNT, J., dissenting).

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$1,500 for personal injuries, sustained by a pedestrian struck by an automobile, will not be held excessive, where one rib was broken, his back weakened, he was unable to work at his previous employment, suffering a loss of \$1.50 per day, and had sustained a loss of \$567 in wages.

¹Reported in 130 Pac. 1141.

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Opinion Per CHADWICK, J.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered May 18, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, for the sum of \$1,500, for personal injuries sustained by a pedestrian run down by an automobile. Affirmed.

C. A. Swartz (Hadley, Hadley & Abbott, of counsel), for appellant.

Neterer & Pemberton, for respondents.

CHADWICK, J.—Appellant Setzer conducts a grocery store in the city of Bellingham, and delivers goods to his customers in the city and its suburbs. This he does with a delivery wagon and horses driven by one George Lee. This method seemed archaic and wasteful of time to defendant Louis E. Wattam, who sold automobiles for the Northwest Automobile Company, of Portland, Oregon, on commissions to be paid out of the purchase price; and in the course of time, that is, on the 17th day of June, 1911, he called on appellant and suggested the need of an automobile delivery truck in his business. It was arranged that a "demonstration" would be had on the morrow; that Wattam would send a truck and a driver to the store, and would make a delivery of goods at Geneva, a hamlet some four miles away on the shore of Lake Whatcom. Lenhart, the driver, and Lee loaded the truck and started on the way. While they disagree as to who was the principal, it is certain that Lee was to show the driver where to deliver the goods. Returning, Lenhart showed Lee "which was high and which was low, and where the gas and spark was." Lee finally took the wheel, he says in obedience to his own impulse to experiment with the thing. He had driven a distance of about two city blocks when he came upon respondent, who was walking along the side of the road, the path being little more than two feet outside the wagon track and between it and the shore of the lake. For some reason—Lenhart and Lee are not quite agreed—Lee lost his control, or his head

—there seems to be an impulse on the part of novices to drive into everything in sight—and drove square into respondent, who fell headlong into the lake and over an uprooted stump, with the machine after and pressing upon him. The stump rolled so as to relieve the pressure. Lenhart stopped the machine, and respondent was extricated. He suffered a fracture of at least one rib, and was injured so that his back has been weak, rendering him unable to follow his avocation of a kneebolter, and compelling him to accept less remunerative employment. Action was brought against all parties, a verdict was rendered in favor of Wattam and Lenhart, and against Setzer. The verdict is attacked because, as it is alleged, there was no sufficient showing of agency.

When Lee came in the night before and had checked up his accounts and turned in his orders, appellant told him that he “need not hitch up in the morning, as there would be an automobile down here to take the groceries out, and if that fellow knows where the customers are you can work in the store that morning.” Lenhart testifies, and it is the testimony upon which the verdict rests, as follows:

“Q. Why did you let Mr. Lee run the automobile? A. I was instructed to show him how to run the machine. Q. Who instructed you? A. Mr. Setzer said the man that was going along was the man to run the machine and to show him all about it. Q. Mr. Setzer said that to you? A. Yes, sir. Q. And to show him all about it? A. Yes, sir. Q. He specially said ‘This man is to run the machine and show him all about it?’ A. He said the man that went was the man that was going to run the machine if he got it and to show him all about it . . . Q. He said he was the man who would have to run it if we buy it and I want you to show him all about it? A. Yes, sir.”

This, it is contended, does not show an agency nor fasten any responsibility upon appellant. We think, however, that the question was one for the jury. Agency is often a mixed question of law and fact. This court has frequently held that, where the evidence is conflicting, it is a question for the jury.

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Opinion Per CHADWICK, J.

But it is said that, because the following question put to Lenhart, "You were not instructed to let him run it, is that a fact?" was answered, "Yes, sir," the verdict cannot stand, as the evidence would thereby show that he exceeded his authority, and would himself become responsible for the consequences. The answer may bear that construction, but taken with the testimony which we have quoted and that of other witnesses, we think the jury was warranted in finding as it did. When appellant said that Lee was the man who was going to run the machine if he got it, and "to show him all about it," it is not for us to say that he was not warranted in turning the machine over to Lee. If I ask a man to show my boy how to swim, "all about it," I should not be heard to complain if he takes him in the water.

Other errors are assigned. They are predicated upon inconsistencies in the pleadings, upon instructions given, and the refusal of the court to submit special interrogatories. Upon the theory that a person may be an agent of two persons at the same time, the complaint was sufficient to pass the objections made to it. The exceptions to the instructions were all made for the purpose of saving the questions we have discussed. The interrogatories which were refused by the court were, so far as material, covered by the general verdict, and the discretion of the court was not abused.

It is complained that the verdict was so excessive as to indicate passion and prejudice. Respondent was unable to work at all for one month, and has been unable to work at kneebolting, suffering a loss in difference of wages of \$1.50 per day. There is some evidence to sustain the finding of the jury that his condition may continue for a time. He suffered considerable pain, and paid out \$25 in doctor's bills.

The verdict seems unreasonable in the light of all the evidence, for had the writer been on the jury he would have said that the injuries were not continuing or permanent; but the jury saw the respondent; the verdict has been passed by the trial judge; he has shown a loss in wages of \$567, which

may continue. This, coupled with the money paid out and an allowance for pain and suffering, may sustain the verdict. At any rate the excess, if any, is not so clear as to warrant our interference.

Judgment affirmed.

Crow, C. J., Gose, and PARKER, JJ., concur.

MOUNT, J. (dissenting)—I dissent. The appellant neither owned nor operated the automobile. The carelessness which caused the injury was the carelessness of the owner or person operating the machine. The appellant was not present and had not authorized the operator to teach his clerk how to run the car. He had not even agreed to buy the car. It is most unjust to hold him for the damage in this case.

[No. 10955. Department One. April 1, 1913.]

JOHN HAUGE, *Respondent*, v. A. WALTON *et al.*, *Appellants*.¹

NAVIGABLE WATERS—SHORE LANDS—ISLANDS. No statutes of this state indicate any intention to pass to the owner of abutting lands the title to islands, even if joined to the mainland by a strip of "shore land," defined by Rem. & Bal. Code, § 6641, as lands bordering on the shores of navigable lakes and rivers, below the line of ordinary high water.

PUBLIC LANDS—"FRAGMENTARY" TRACTS OR ADJOINING ISLANDS—FEDERAL GRANT—TITLE OF STATE—RIPARIAN RIGHTS. Under the constitution whereby the state has been granted by the Federal government title to all shore lands, and the beds of navigable lakes and streams, riparian owners under Federal patent take title only to the line of ordinary high water, and acquire no interest in islands severed from the mainland by shore lands; hence such an owner who has purchased from the state the "abutting shore lands," acquires no interest in an island, separated from the mainland by the intervening shore lands, although during low water in the dry season the island was connected with the mainland by a strip of uncovered shore lands.

EJECTMENT—TITLE. In ejectment, the plaintiff must recover on the strength of his own title.

¹Reported in 131 Pac. 248.

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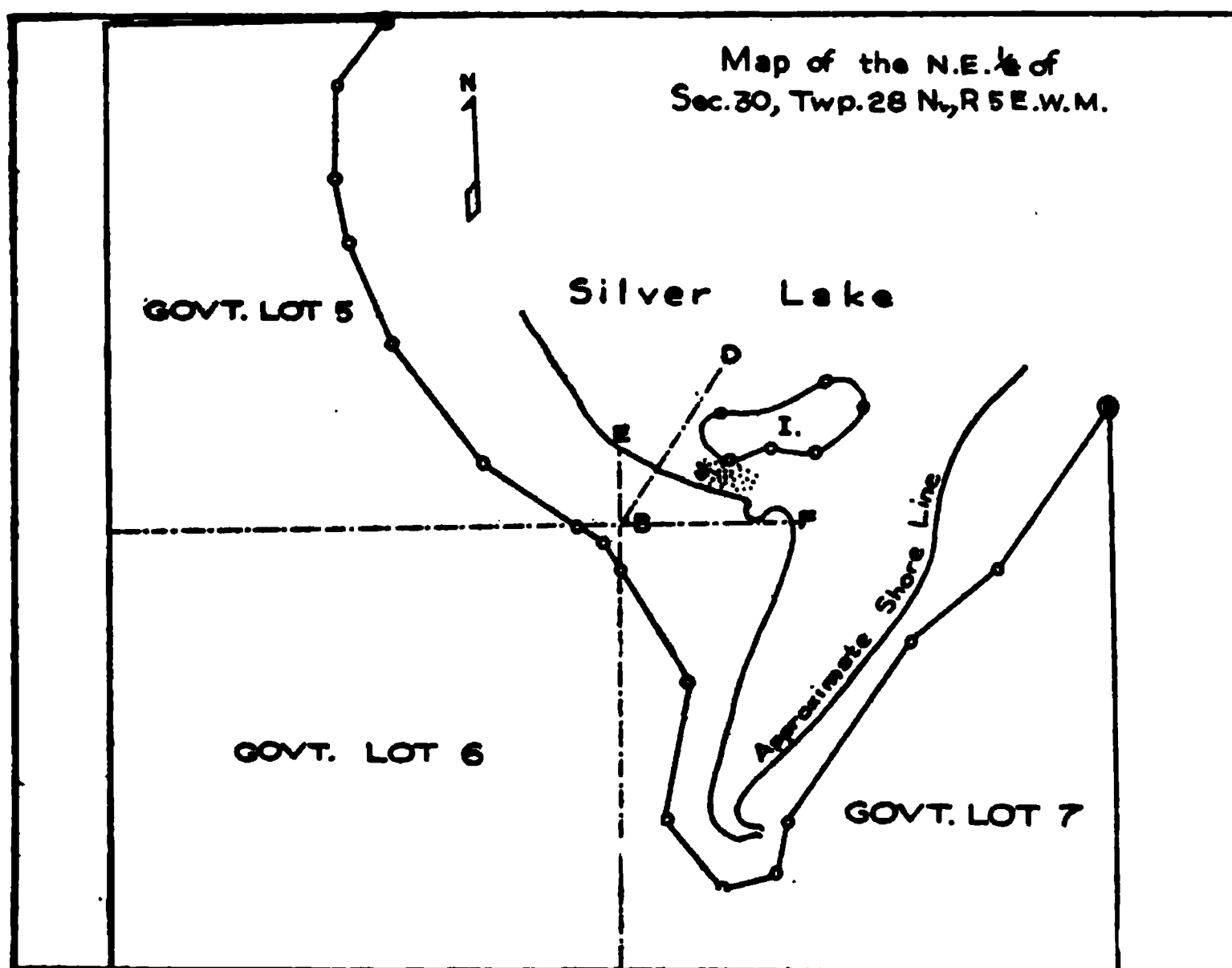
Opinion Per CHADWICK, J.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 1, 1912, upon findings in favor of the plaintiff, in an action of ejectment. Reversed.

Chas. K. Jenner and *G. J. Hodge*, for appellants.

Hathaway & Alston, for respondent.

CHADWICK, J.—The plat will illustrate our discussion.



There is no statement of facts, and the only question open is whether or not the findings sustain the judgment of the lower court. It is insisted that the findings were made upon an indefensible theory of law, and that no lawful judgment can be entered thereon. This necessitates a more complete discussion than would otherwise be necessary. There are some unchallenged remarks in the briefs, and we shall adopt them and the findings as our warrant for the following statement: Plaintiff is the owner of lots six and seven, as shown

on the plat. A stranger to this action owns lot five. About five years before the commencement of this action, defendants had permission of the owners of lot five to settle on the island, which has an area of about three-quarters of an acre. They have since resided thereon. In the dry season, there is a strip of uncovered land connecting the island with the shore. This strip is indicated on the plat by small dots. In the winter time, this strip is covered by about twelve inches of water. As soon as plaintiff discovered the presence of the defendants, he began this action to oust them. From a judgment of ouster, defendants have appealed.

In the year 1908, plaintiff purchased the shore land abutting lot seven, and now claims title thereto under a contract from the state. A memorandum decision rendered by the trial judge indicates that it was his opinion that the island, being unsurveyed by the government of the United States, was shore land and passed from the state to the plaintiff under his contract. The court did not make a specific finding to this effect. Indeed, the findings seem to have been drawn upon a different theory, to which we shall presently refer. We shall not go into a discussion of the law of shore lands, for we are agreed that the island is not, and cannot from the very nature of things, be called shore lands. "Shore lands are lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water." Rem. & Bal. Code, § 6641. There is nothing in this definition or the statutes to indicate that it was ever the purpose of the state to convey title to any upland, although it might be joined, as this island is, with the mainland by a strip of shore land.

The only theory, therefore, upon which the findings of the trial judge can be sustained is, that the island is an unsurveyed island or neglected fragment such as is mentioned in *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447; and it is likely that counsel, in drawing the findings which the court has signed and which have been brought to us, had in mind the rule of law which attaches these small

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islands and fragments to the adjoining or abutting property. We understand this rule to be that, if there be a fragment of land along the shore of a lake or stream, it will attach to the government subdivision adjoining it, or if it be an island and there is no navigable channel intervening, that it will pass to the nearest land abutting the shore. In order, therefore, to settle a difference that might arise between the owner of government lot five and government lot seven, for each might contend that he was the owner of the small fragment "E—B—F," the court bisected the fragment with the line "B—D" and held the island to be then abutting and appurtenant to government lot seven. The fault in this theory lies in this: that wherever the right to claim small islands as a part of the upland has been applied, it has been where, under the law of the state, the owner of the upland had a riparian proprietorship extending to the thread of the stream or lake. He then takes title in virtue of his riparian ownership. 29 Cyc. 354; *Whitaker v. McBride*, 197 U. S. 510; *Hardin v. Jordan*, 140 U. S. 371; *Franzina v. Layland*, 120 Wis. 72, 97 N. W. 499; *Sliter v. Carpenter*, 123 Wis. 578, 102 N. W. 27.

The government of the United States has granted to the state of Washington title to all tide and shore lands and to the beds of all navigable streams and lakes. This title is asserted in the constitution of the state, in various acts of the legislature, and acts amendatory thereto, and has been sustained by repeated decisions of this court. Plaintiff took under his patent to the line of ordinary high water. That line marked the limit of his boundary.

"Unquestionably, the supreme court of the United States has uniformly held that grants of uplands bordering on navigable waters convey to the grantee title down to the line of ordinary high water of such navigable waters, but they have just as uniformly held that the answer to the question whether it conveys more than this, depends upon the local law of the state wherein the granted lands lie. If the local law recognizes such grants as extending to low water mark or to the thread of the stream, it will be so recognized by the

Federal authorities; but if the state limits the grant to the line of ordinary high water, as our state does, this line will be held to mark the boundary of the grant. This is founded on the principle that the shores and beds of all bodies of water, whether navigable or unnavigable, belong to the state on which they are situate, and that it is for the state to say whether or not it will assert its title to such shores and beds, or whether it will surrender them to the upland proprietor." *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278.

See, also, *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; *Van Siclen v. Muir*, 46 Wash. 38, 89 Pac. 188; *Washougal & La Camas Transp. Co. v. Dalles P. & A. Nav. Co.*, 27 Wash. 490, 68 Pac. 74; *Nassa v. Seaborg*, 64 Wash. 164, 116 Pac. 658.

In this case, there is an intervening proprietorship which was held and maintained by the state until it was purchased by plaintiff under his contract. The state, so far as we are informed, has never attempted to assert title to the island as a part of its shore lands; therefore, plaintiff not having taken anything beyond the line of ordinary high water (granting his complete title to the fragment "E—B—F") from the government, and having no claim to the island as shore lands of the state, it follows that he has no title to sustain the action which he now brings.

In the case of *Niles v. Cedar Point Club*, 175 U. S. 300, the government surveyor limited his survey at what he called a marsh, and meandered along it so as to leave it between the meander line and the navigable waters of Lake Erie. The court held that the patentee of abutting land could not claim the marsh land as a part of the grant, for having bought a fractional part of a section and having paid for that part, she was limited to the very lands conveyed to her and for which she had paid, and that her title did not extend beyond the meander line or, as we have declared the law to be in this state, beyond the line of ordinary high water. That case is in principle identical with this one. Here there was a frac-

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tional lot. The government limited its grant to the line of ordinary high water, and plaintiff has all that he ever earned or purchased, the source of his title being unknown to us. In *French Glenn Live Stock Co. v. Springer*, 185 U. S. 47, the court held that, where a survey showed a meander line bordering on a tract of marsh or swamp lands, the grant terminated at the meander line, and did not carry swamp lands lying between it and the shore. See, also, *Horne v. Smith*, 159 U. S. 40; *Kirwan v. Murphy*, 189 U. S. 35.

The cases sustaining the right to claim islands, as we have said, depend upon a riparian proprietorship in the bed of the stream, and presuppose and rest upon the fact that there is intervening water the bed of which belongs to the abutting owner. The cases we have just cited illustrate the distinction between those cases and the case we have at bar. "As in them the swamp and boggy land is to be treated as land" (the *Niles* case *supra*), so is the whole theory of our state ownership of tide, shore and swamp lands made to rest upon the theory that such land is land and not water. According to the plat that is submitted in evidence, it is evident that there is no intervening water between the shore land and the island, and a judgment that the owner of government lot seven can claim title to the unsurveyed island upon the theory that it is an island abutting and appurtenant to his land, has not the sustaining grace of the law. While we have not followed the argument of counsel, we nevertheless agree that the findings of the lower court were drawn upon an indefensible theory of the law, and that plaintiff has no title, it being the rule in this class of cases that a plaintiff must recover upon the strength of his own title. It follows that the case will be remanded and dismissed. Whatever the rights of the defendants may be, we do not undertake to say. It is enough that plaintiff has no interest.

Remanded with orders to dismiss.

CROW, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 10777. Department One. April 4, 1913.]

ANGELO VILLANI, *Respondent*, v. WASHINGTON BRICK, LIME
AND SEWER PIPE COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of an employee is for the jury, where there was evidence that an elevator started automatically and was running away, when, in order to save himself, he grasped the wrong cable and his hand was drawn into the drum.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 31, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee injured by an unguarded cable drum. Affirmed.

Cannon, Ferris & Swan and *Walter A. White*, for appellant.

S. A. Mann and *Lucius G. Nash*, for respondent.

CHADWICK, J.—The appellant was engaged in the manufacture of brick near Clayton, Washington, and plaintiff with two others was engaged in running a push car from the clay pit to an elevator. The elevator was set in a frame and operated between three floors or levels. Plaintiff and those with him were returning with an empty car, and had pushed it partly onto the elevator, when the car stuck. Plaintiff was ahead and the two others behind the car, and they were pushing and hauling when the elevator started down. The car tipped off at the second level, and the elevator descended to the bottom and almost immediately started up again. The car was stopped and started by a cable attached to controllers. This cable was pulled up or down as the operator desired the elevator to move. Plaintiff took hold of one of the cables carrying the elevator, and his finger was crushed on the drum over which the cable worked.

¹Reported in 131 Pac. 219.

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Plaintiff disclaims any reliance upon the factory act, and the court instructed the jury that he could not recover anything on account of the insufficiency of the elevator and equipment. The jury answered the following special interrogatories:

"Do you find from the testimony that persons using an elevator such as the one in question usually and customarily guarded the drum upon said elevator? Answer: Yes. Did the plaintiff know at all times prior to the accident that this drum was not guarded? Answer: Yes. Did the plaintiff act with reasonable care in taking hold of the cable, which wound around the drum, under the circumstances? Answer: Yes."

There is some testimony tending to show that the cables could have been conveniently guarded. So that the only question left in the case is whether, under the circumstances, plaintiff was negligent in taking hold of the wrong cable.

It is the duty of the master to furnish a reasonably safe place to work, and to guard against such dangers as would be anticipated by a man of ordinary prudence. Upon this theory plaintiff would not have any right of recovery, for he is charged with the assumption of all usual risks. But this rule is not to be applied without its exception, if the testimony warrants it, and that is that the servant is not bound by it in the face of a sudden peril not incident to his employment, where there is no time to deliberate and the impulse of self-preservation can be said to usurp that judgment which a man of ordinary prudence would exercise when confronted with a known danger. His judgment is to be measured by the immediate circumstances. While there is much testimony to show that it was impossible for the elevator to stop and start without the intervention of the plaintiff or his fellow servants, there is still enough to sustain the verdict of the jury that it did start automatically; that it was running away. If plaintiff, in his extremity, took hold of the wrong cable, it is for the jury to say whether he acted as a man of

ordinary prudence would have acted under the same or similar circumstances.

We think the verdict can be sustained by reference to *Smith v. Hewitt-Lea Lumber Co.*, 55 Wash. 357, 104 Pac. 651; *Williams v. Ballard Lumber Co.*, 41 Wash. 338, 88 Pac. 323; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114; and *Cook v. Chehalis River Lum. Co.*, 48 Wash. 619, 94 Pac. 189.

Affirmed.

CROW, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 10798. Department One. April 4, 1913.]

JOSEPH F. WOLPERS, *Respondent*, v. THE CITY OF SPOKANE,
Appellant.¹

MASTER AND SERVANT—SAFE PLACE—BRIDGE CONSTRUCTION—NEGLECT—QUESTION FOR JURY. The negligence of a city in failing to properly support a temporary arch for a bridge is for the jury, where witnesses testified that it "buckled" or "listed," and leaned upstream six to eighteen inches, that it was an efficient barrier to the wind, and that the wind which caused the fall was not unusual or unprecedented.

SAME—ASSUMPTION OF RISKS. A workman on a city bridge does not assume the risks of changing conditions requiring engineering oversight and due to outside causes, as a high wind and listing, as distinguished from those incidental to the work itself.

NEW TRIAL—GROUNDS—MISCONDUCT OF COUNSEL. In a case against a city, a new trial will not be granted for misconduct of plaintiff's counsel, in that at one time he represented the defendant, where it appears that when he was corporation counsel, his name had been signed to an answer for the defendant, but that he had nothing to do with the case, and was unexpectedly called to represent the plaintiff in the absence of his partner, and the case had been well tried and twice appealed.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 11, 1912, upon the verdict of a jury rendered in favor of the plaintiff, for personal in-

¹Reported in 131 Pac. 230.

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Opinion Per CHADWICK, J.

juries sustained through the fall of a temporary arch of a city bridge under construction. Affirmed.

Cannon, Ferris & Swan and Walter A. White, for appellant.

Roche & Onstine and Morrill, Chester & Skuse, for respondent.

CHADWICK, J.—Plaintiff was a carpenter in the employ of the defendant city. He was working upon a false arch which the city was erecting for the purpose of constructing a permanent concrete bridge across the Spokane river. The arch fell, throwing plaintiff upon the rocks below. He was so injured that a jury returned a verdict against the defendant in the sum of \$5,000. The false arch was a temporary wooden structure, and, as we are informed, was built to sustain the longest span of concrete construction in the world. It was guyed by lines, probably ten on the upstream side and ten on the downstream side of the bridge. The arch had received some support from an old steel bridge which was built in the same place. In the progress of the work this was cut in the center, and it is doubtful whether it supported the arch in any degree at the time it fell.

The first question presented is the sufficiency of the evidence to sustain the verdict. It is the contention of the city that it was not guilty of any negligence, and that respondent assumed the risk of his employment, saying:

“The testimony shows conclusively that the methods adopted and the precautions taken by the appellant in the performance of the work in which it was engaged, were ample and sufficient under ordinary circumstances and conditions, and that the falling of the temporary arch was due to an unusual and violent windstorm which ordinary prudence and foresight could not have anticipated or guarded against.”

We cannot agree that the testimony is conclusive upon this point. It is true that certain witnesses said that, in their judgment, the arch was sufficiently guyed to stand the strain

of an ordinary wind; but there is testimony tending to show that the placing of the arch had not progressed satisfactorily, and had caused some dissensions and discussions between the engineers and workmen. Some say it "buckled" or "listed." It "leaned" upstream to an extent variously estimated from six to eighteen inches, necessitating the loosening of the guy wires on the upstream side, so that the others might be tightened. The weather observer testified that winds having a velocity of from thirty to fifty-two miles an hour had occurred during the past thirty years. The jury was warranted in finding that the wind was not unusual or unprecedented. The arch stood high above the stream, and was so constructed as to make an efficient barrier to the wind.

We think that the case clearly called for the intervention of a jury. Whether the arch was constructed and braced so as to stand under ordinary conditions, may excite a difference in the minds of reasonable men, and this is the supreme test when a court is called upon to pass upon these questions as matters of law. Nor do we think plaintiff assumed the risk because of the changing character of the work. Men are called upon to meet the hazards of construction; but in all work requiring engineering oversight they are surely not to be charged under that line of cases holding that a workman is bound to know and assume the risk of such changes as the necessities of construction require. In those cases the proximate cause is found in some change or development incident to the plan of construction; while here the destructive agency was a thing apart which the workman could not guard against or avoid by any exercise of care. He had a right to proceed with his work in confidence that the master had guarded against such dangers as might arise from outside causes as distinguished from those incidental to the work itself. *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481. Our judgment is that there was evidence to sustain the verdict, and that plaintiff should not be held to have assumed the risk.

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Opinion Per CHADWICK, J.

This case was before this court and reported in *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113. At that time, Mr. A. M. Craven was corporation counsel. Prior to Mr. Craven's incumbency and at the time of the accident, one of the present attorneys for the plaintiff was corporation counsel of the city of Spokane. Plaintiff presented his claim, but it was rejected by the city under the advice of the corporation counsel's office. Counsel says:

"I did not . . . have anything to do with the case, in drawing the pleadings or otherwise and took no part in it for the city, and while my name appears on the answer same was prepared by the other attorneys for defendant who had complete charge of the case throughout. Mr. L. F. Chester became a member of the firm of Morrill, Chester & Skuse about a month ago, and before becoming a member of the firm he was retained by the plaintiff to assist in the trial of the case, and fully expected to do so, but yesterday was unexpectedly called out of the city to be absent several days, and has asked me to take his place and I cannot see any reason why I should not do so. I make this explanation so your Honor will understand the circumstances under which my name appears at one time as one of attorneys for defendant, and I now appear at this time as one of the attorneys for plaintiff."

It is contended that, by thus appearing, counsel has violated the ethics usually governing the conduct of attorneys and is guilty of such misconduct as should entitle the city to a new trial. We think, in the light of the whole record, it would be unjust to order a new trial. The case has already been twice tried and twice appealed, and granting that the conduct of counsel is seemingly violative of the ethics of the profession, we think in the light of counsel's explanation that he had nothing to do with the former trial, it would be unjust to punish plaintiff to the extent of putting him to the stress of a new trial.

It is further contended that the damages are so excessive as to indicate passion and prejudice on the part of the jury.

We have examined the evidence and, while the damages seem to be substantial, they are not so great as to indicate that the jury was so controlled.

Judgment affirmed.

Crow, C. J., MOUNT, GOSE, and PARKER, JJ., concur.

[No. 10857. Department One. April 4, 1913.]

WASHINGTON CHARCRETE COMPANY, *Respondent*, v. A. D.
CAMPBELL *et al.*, *Appellants*.¹

CONTRACTS—VALIDITY—RESTRAINT OF TRADE. An agreement by the seller of a plant for the manufacture of laundry trays, cement blocks and concrete products, not to reenter in such business in the states of Washington and Oregon for a period of five years, is not void as in restraint of trade, upon its face, since the covenant may have been reasonably necessary to the success of the business.

Appeal from a temporary restraining order of the superior court for King county, Albertson, J., entered July 2, 1912. Affirmed.

Peterson & Macbride, for appellants.

Munn & Brackett, for respondent.

MOUNT, J.—The trial court issued a restraining order in this case, enjoining the defendants from manufacturing or selling laundry trays within the state of Washington, and from soliciting the patronage of present or former customers of the plaintiff. The defendants have appealed from that order.

The facts are not disputed. It appears that on October 30, 1911, the plaintiff, a Washington corporation, purchased from the defendants a plant located in Seattle for the manufacture of laundry trays, cement blocks, and concrete products. At the time of the sale a written contract was entered

¹Reported in 131 Pac. 208.

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into, reciting the consideration for the sale and describing the property conveyed. This contract contained a provision as follows:

"As a further part of the consideration of said sale parties of the first part [being the defendant Campbell and others] each for himself agrees that he will not either on his own account or as an employee for another, re-enter the business of manufacturing or selling laundry trays in the states of Washington or Oregon within a period of five years from the date of this instrument.

"Dated at Seattle, Washington, this 30th day of October, A. D. 1911."

The defendants are threatening to enter into said business in violation of the terms of the contract.

The point argued in the briefs upon this appeal is that the contract is void upon its face, being a contract in restraint of trade, and because the restrictive clause is wider than the boundaries of the state. There is apparent conflict in the authorities upon the question presented here. But we are satisfied that the general rule as supported by the great weight of authority, is that, where the vendor sells the good will of a business, he is bound by any covenant which is reasonably necessary for the success of the business or the preservation and protection of the property which he sells. The limit of time and territory contained in such covenant depends for its validity upon the character and extent of the business, as existing at the time of the sale and reasonably to be anticipated as necessary for the successful conduct of the business in the future. Nearly all the authorities cited in the briefs in this case, and many not so cited, will be found in the note to *Allen Mfg. Co. v. Murphy*, 22 Ont. Law Rep. 539, reported in 20 Ann. Cas. 661. This note shows that a majority of the courts "have declined to declare such contracts invalid simply because of their territorial extent," and then cites numerous cases holding that contracts covering entire states, and contracts covering more than one state, and also covering the whole United States, have been declared

valid, depending upon the nature and extent of the business. In the same note the cases relied upon by the appellants here are also cited.

We deem it unnecessary to further recite or comment upon the cases here. In this case the property sold was a manufacturing plant for laundry trays and other products of like nature. Naturally the market for such products would not be merely local, but might reasonably extend to the limits of the state and possibly beyond. It is plain from the contract itself that the parties to it understood that the business would extend beyond the limits of the state, if it had not already at that time done so, because the contract provides that the vendors will not "re-enter the business of manufacturing or selling laundry trays in the states of Washington or Oregon;" the inference being clear that the business at that time had extended to those limits. In *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008, the court said:

"All such covenants do in some degree restrain trade. Whether the restraint is permissible by law depends upon the facts. The party who alleges that the restraint is such as to be in law obnoxious is bound to prove the facts which make it so. There can be no presumption, from the fact that there is some restraint in the instant case, that it is an unlawful one. With respect to the territory to which the restriction should apply, the rule has always been that it might extend to the limits wherein the plaintiff's trade would be likely to go."

The appellants in this case make no showing that the contract is in fact in restraint of trade. They rely wholly upon the face of the contract. This contract upon its face is valid, according to the great weight of authority, as we have seen above.

The order appealed from is therefore affirmed.

CROW, C. J., GOSE, PARKER, and CHADWICK, JJ., concur.

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[No. 10912. Department One. April 4, 1913.]

PACIFIC HARDWARE COMPANY, *Respondent*, v. O. E. OLSEN
et al., *Appellants*.¹

CONTRACTS—BUILDING CONTRACTS—CONSTRUCTION—EXTRINSIC AID. A contract for the construction of a courthouse which provided that the contractor should furnish all the materials "except the heating and electric work," construed in connection with the specifications, made a part of the contract, which provided that he shall furnish all rough hardware and "shall allow \$500, for the purchase of 'finishing hardware'" to be selected by the architect, requires the contractor to furnish and pay for finishing hardware to the amount of \$500; and no extrinsic aid in construing the contract is needed.

Appeal from a judgment of the superior court for Snohomish county, Bell J., entered June 8, 1912, upon findings in favor of the plaintiff, in an action on contract tried to the court. Affirmed.

Hathaway & Alston, for appellants.

Cooley & Horan and *R. Mulvihill*, for respondent.

GOSE, J.—This action was brought to recover a balance of \$556.11, for finishing hardware which the plaintiff sold and delivered to the defendants Olsen and Mellen, which was used by them in the construction of a courthouse, at the city of Everett, in Snohomish county. The firm of Olsen & Mellen had a contract for the construction of the courthouse. The contract provides that:

"The contractor shall and will provide all the materials and perform all the work for the construction and completion of a court house . . . in the city of Everett . . . (except the heating and electric work) as shown on the drawings and described in the specifications prepared by Siebrand & Heide, architects."

¹Reported in 131 Pac. 217.

The specifications, which were made a part of the contract, contained this clause:

“Contractor shall furnish and install all construction rough hardware such as nails, spikes, bolts, sash weights, roller bearings, sash pulleys and copper sash chain, Tabor sash fixtures, etc. He shall allow \$500 for the purchase of the finishing hardware, i. e. locks, butts, coat hooks, door stops, etc., to be selected by the architects.”

The defendant Title Guaranty & Surety Company, as surety, and the contractors as principals, executed a bond to the state conformably to the provisions of the code, Rem. & Bal., § 1159. The plaintiff in due time filed notice of its claim with the county auditor as provided by Rem. & Bal. Code, § 1161. This action was brought upon the bond, and a judgment was entered in favor of the plaintiff for the full amount of its claim. The defendants have appealed.

The appellants contend that the contractors were not obligated to furnish any finishing hardware, but that the contract, read with the clause of the specifications which we have set forth, required the architect to select such material to be paid for by the county and \$500 to be deducted from the contract price. The two quoted clauses must be read together. The contract proper provides that the contractor shall furnish *all* the materials and perform *all* the work for the “construction and completion” of the courthouse, “except the heating and electric work.” The clause in the specifications does not designate either who shall furnish or who shall install the “finishing hardware.” To determine upon whom these duties rest we must look to the body of the contract. We there find that these obligations are expressly imposed upon the contractors. It is significant, also, that the finishing hardware is not contained in the excepted items. While the clause in the specifications is not altogether clear, we think a fair and sensible construction means that the contractors shall furnish finishing hardware to the amount of \$500 to be selected by the

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architect, and that if they furnish more than that amount the county shall repay them the excess.

Section 1159 provides that the bond shall be conditioned "that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics and subcontractors and materialmen." The respondent has brought itself within the terms of the bond. The evidence is that it furnished the hardware to the contractors, and that it was actually used in the completion of the courthouse. The architect testified as to the meaning of the clause in the specifications. We do not think that, when the clauses are read together, any extrinsic aid is needed in their interpretation.

The judgment is affirmed.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10916. Department One. April 4, 1913.]

THE CITY OF SPOKANE, *Respondent*, v. FRANK T. MILES *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—REVIEW BY COURTS. An assessment district fixed by commissioners will not be changed by the courts unless the commissioners acted arbitrarily or fraudulently, or upon a fundamentally wrong basis; and not for a mere difference of opinion as to what were the proper limits.

SAME—ASSESSMENT—APPORTIONMENT. A city need not be charged with part of the cost of a local improvement, where there was no evidence that any special benefit accrued to the city at large.

SAME—PROCEEDINGS—ORDINANCE—VARIANCE. It is not a material variance that an ordinance directed a local improvement to be paid wholly or in part by a special assessment upon property benefited, and the judgment recited that the ordinance required the same to be paid for in whole by such assessment, where the board of eminent domain commissioners found that no part of the cost should be borne by the city.

¹Reported in 131 Pac. 206.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered August 13, 1912, confirming on appeal an assessment roll. Affirmed.

McCarthy & Edge and *Hance H. Cleland*, for appellants.
H. M. Stephens and *Bruce Blake*, for respondent.

GOSE, J.—This is an appeal by certain property owners from a judgment confirming an assessment roll. The assessment was made for the purpose of paying damages awarded to the defendants Miles and wife, caused by a change of grade of Main avenue between the west line of Lincoln street and a point twenty-five feet east of the east line of Wright street, in the city of Spokane. The assessment roll is assailed upon two grounds: (1) It is said that the commission did not include all property benefited by the improvement, and (2) that a part of the cost of the improvement should have been assessed to the city.

In support of the first contention, the objectors introduced four witnesses, each of whom expressed the opinion that a greater area should have been included in the assessment district. Three of these witnesses said that the district contained only a small part of the property benefited. One of them said that the district should have been extended west to the lower end of Peaceful Valley, or about four thousand feet west of the west line fixed by the commissioners. While the other witnesses did not agree that the district should have been extended so far to the west, they were unanimous in the view that it should have extended east to Howard street, three blocks beyond the point fixed by the commissioners, and that it should have included certain property north of Main avenue immediately west of Monroe street. Main avenue lies south of the Spokane river and runs east and west. Prior to the regrade, it passed under the approach to Monroe street bridge, and travelers from the west desiring to cross the bridge to the north side of the river were required to go to Lincoln street one block east of Monroe street and loop back to the

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latter street. Under the regrade Main avenue intersects Monroe street, at which point the river is spanned by a bridge which is the principal thoroughfare connecting the two parts of the city. The new grade west of Monroe street will be somewhat easier than the original grade. The city offered no evidence other than the report of the board of eminent domain commissioners. The statute (Rem. & Bal. Code, § 7795), makes this report competent evidence. Our statute (Rem. & Bal. Code, § 7788), provides that the superior court having jurisdiction shall appoint three "competent" persons as commissioners, upon the petition of any city of the class named in the act.

Assessment districts must have a point of beginning and a point of termination. The fixing of these extremes often presents many perplexing questions upon which there would be a never ending variety of opinion. It is, therefore, of the first importance that some definite rule be laid down for the guidance of trial courts. The best rule that has been announced, and the only practicable working rule, is that the courts should not change the district established by the commissioners, except where the commissioners have acted arbitrarily or fraudulently or have proceeded upon a fundamentally wrong basis. *Spokane v. Kraft*, 67 Wash. 245, 121 Pac. 880; *In re Seattle*, 50 Wash. 402, 97 Pac. 444; *In re Jackson Street*, 62 Wash. 432, 113 Pac. 1112; *In re Seattle*, 46 Wash. 63, 89 Pac. 156; *In re Harvard Avenue North*, 47 Wash. 535, 92 Pac. 410. Measured by this rule, the evidence is not sufficient to overcome the probative force of the report.

In respect to the second contention, the evidence does not show that any especial benefit accrued to the city at large in consequence of the improvement. "The city, like a private owner, can only be assessed for an improvement where it is especially benefited." *Spokane v. Curtiss*, 66 Wash. 555, 120 Pac. 70. To the same effect: *In re Fifth Avenue etc.*, 66 Wash. 327, 119 Pac. 852.

The ordinance (A-5956) directing the institution of a suit

to fix the damages flowing from the regrade, provides: "The cost and expense of said improvement shall be paid *wholly or in part* by special assessment upon the property benefited thereby." The order of reference to the board of eminent domain commissioners, after reciting that "it appearing to the court that ordinance No. A-5956, under which said suit was begun, and prosecuted provided that the improvement should be paid for *in whole* by special assessment on the property benefited thereby," directed the board "to levy an assessment upon the property benefited in accordance with law." The board reported "that no part of the cost thereof [meaning the improvement] shall be borne by the city of Spokane, as the city of Spokane at large in our judgment has not received any benefit therefrom." It is argued that the variance between the order and the ordinance impairs the probative force of the report. The variance is more apparent than real and is not of sufficient gravity to impair the force of the report, or to require a resubmission to the commissioners.

The judgment is affirmed.

CROW, C. J., MOUNT, PARKER, and CHADWICK, JJ., concur.

[No. 10725. Department One. April 4, 1913.]

P. A. BRIGGLE, *Respondent*, v. C. E. Cox *et al.*, *Appellants*.¹

TENANCY IN COMMON — PARTITION BY PAROL — EQUITY — FRAUDS, STATUTE OF. A parol partition between tenants in common, followed by possession and improvements in severalty, operates in equity as a severance of the cotenancy, which is not within the statute of frauds.

TENANCY IN COMMON—JOINT TRANSACTIONS—TRADE—FALSE REPRESENTATIONS—LIABILITY FOR SECRET BONUS. Where tenants in common who had severed their cotenancy by parol and the making of improvements in severalty, afterwards dealt jointly in making a trade of their interests and treated the cotenancy as existing, one of them, standing in a confidential if not fiduciary relation to the other in making the trade, cannot make a secret profit through false

¹Reported in 131 Pac. 209.

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suggestion or misrepresentation leading the other to believe that they had contributed the consideration in equal parts; and if he does so, he is liable to the other in an action for money had and received.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered June 17, 1912, upon findings in favor of the plaintiff, in an action for money had and received, after a trial to the court. Affirmed.

C. E. Ellis and *Carl W. Swanson*, for appellants.

McWilliams, Weller & McWilliams, for respondent.

Gose, J.—On and for about one year prior to the second day of September, 1911, the plaintiff and the defendant were the joint owners of a contract entitling them to purchase a tract of land in Kootenai county, the state of Idaho. They also owned jointly certain personal property which was then upon these premises. About the middle of August, 1911, they made a parol partition of the land, and divided a portion of the personal property. In pursuance of this arrangement, they took possession of the tracts in severalty, and severally commenced fencing. On the 2d day of September, 1911, the fencing of the respective tracts was substantially completed. There was no exchange of conveyances between the parties. On the last named date, and while the exchange rested in parol, the plaintiff and the defendants jointly assigned the contract for the purchase of the Idaho land to Dennis Moylan and John Moylan, and jointly transferred to them the personal property upon the Idaho land, in exchange for fourteen hundred acres of land situated in Garfield county, in this state, which the Moylans conveyed to the plaintiff and the defendant Ida May Cox, and which they later partitioned. There was a balance of \$6,000 due upon the purchase price of the Idaho land, and the land in Garfield county was mortgaged for \$8,000. The exchange of properties was subject to these burdens. The defendant C. E. Cox, in the exchange, received \$1,500 as boot money, a fact not then known by the

plaintiff. This suit was brought to recover one-half of that sum. The plaintiff was successful in the court below, and the defendants have appealed.

The court found, in addition to the facts stated, that the appellants represented to the respondent that they could exchange the contract for the Idaho land subject to the unpaid purchase price, together with all the personal property located thereon, for the Garfield county land, subject to the mortgage upon it, and that the basis of the exchange was "equity for equity" in the respective properties; that, relying upon this statement that the exchange was "equity for equity," the respondent, jointly with the appellants, executed and delivered to the Moylans an assignment "of all their individual interest" in the contract, in exchange for a conveyance of the land in Garfield county, to the respondent and the appellant Ida May Cox; that the trade was a joint one upon the part of the parties to this action; that, about the 1st day of November following, the respondent first learned that the appellants had secured an additional consideration consisting of a mortgage for \$1,500, upon the Idaho land, taken in the name of one McMullan for the benefit of the appellants, for the purpose of concealing from the respondent the real nature of the transaction; that, on the 18th day of December following, McMullan assigned the mortgage to the appellant C. E. Cox, and that the mortgage was paid on the 13th day of May, 1912. The findings are supported by the evidence.

The assignment of the contract, the deed from the Moylans, and the mortgage from the Moylans to McMullan, were all executed on the 2d day of September. The mortgage was not recorded until the 2d day of October following. The assignment of the mortgage was executed on the 18th day of December, but was not filed for record until the 15th day of May following, that being the date upon which it was paid.

The record makes it clear that the appellant husband led the respondent to believe that the properties were to be exchanged

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unit for unit; or, as the court found, equity for equity, the Moylans receiving in addition the personal property then upon the land in Idaho. The respondent so testified. He also said that, after he had seen the Garfield county land, he told the appellant that it did not square with the representations, either in respect to quality or the quantity of fallow land, and that he then said to him: "If you want to trade for it, go ahead. I will be with you. I did not want to be a stumbling block for him." He further stated that the appellant said: "We will just trade all of the Cox and Briggles stuff for the Garfield county land and the crop that's on it." The appellants did not examine the land in Garfield county, and the appellant husband said that he told the respondent that he had agreed upon terms of exchange, provided the respondent would convey his interest in the contract and the personal property; that he did not say the exchange was equity for equity, but that each understood that he was making his own bargain. The fact that the mortgage was taken in the name of McMullan, a resident of the state of Nebraska, and withheld from the record for a month after its execution, together with the further fact that the assignment to appellant was not filed for record for several months after its execution and not until the mortgage was paid, lends distinct color to the respondent's version of the conversation. The honest transaction rarely pursues the devious or obscure path. It rather chooses to follow the plain, beaten way, and proclaims itself as it really is.

The authorities cited by the appellants upon the proposition that a parol partition between tenants in common, followed by the parties taking possession and making permanent improvements in severalty, operates in equity as a severance of the cotenancy, announce correct principles of law. *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213; *Cade v. Brown*, 1 Wash. 401, 25 Pac. 457; 30 Cyc. 161; *Rountree v. Lane*, 32 S. C. 160, 10 S. E. 941; *Kennemore v. Kennemore*, 26 S. C. 251, 1

S. E. 881; *Willey v. Bonney's Lessee*, 31 Miss. 644; *Wood v. Fleet*, 36 N. Y. 499, 93 Am. Dec. 528; Freeman, Cotenancy & Partition (2d ed.), § 402. In *Graves v. Smith* and *Cade v. Brown*, this court held that a parol contract for the sale of land, where the vendee takes possession and makes permanent improvements, takes the transaction out of the statute of frauds. The same equitable principles apply to a parol partition of land.

The appellants also suggest the admitted rule that one cotenant is at liberty to sell his interest in the property to the other or to a stranger, at such price as he deems satisfactory; and that he is not called upon in such cases to disclose all he may know, or to inform his cotenant of matters which, by the exercise of reasonable diligence, he might ascertain for himself.

There are, however, other circumstances in this case of such cogency as to render these principles inapplicable. The relations between the respondent and the appellant husband were confidential, if not fiduciary. In such case, if there be any, though slight, false suggestion or misrepresentation, the transaction is fraudulent. While the parties had severed the cotenancy, the court found that they dealt jointly with both the real and personal property. They contributed the consideration for the Garfield county land in equal parts, and received a conveyance executed to the respondent and the appellant wife jointly. Moreover, they paid a commission to the broker who negotiated the sale out of the joint personal property. In short, they treated the cotenancy as existing. It follows that the appellants may not avail themselves of a secret profit which, when exposed to light, was a part of the consideration for the common property. 38 Cyc. 15; *Garr v. Boswell*, 18 Ky. Law 814, 38 S. W. 513; *Calkins v. Worth*, 215 Ill. 78, 74 N. E. 81; *Walker v. Evans*, 98 Mo. App. 301, 71 S. W. 1086.

In *Garr v. Boswell*, a mother and her children sold a tract of land which they jointly owned. Two daughters each re-

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ceived a secret bonus from the purchaser. There was no evidence of any misrepresentation. In holding that the money thus obtained should be divided between the parties as the balance of consideration was divided, the court said:

"We concede the right of one joint tenant to sell his interest in land without consulting his cotenants, and at any time and price he may choose. But when, as in this case, the parties propose to sell together, and the act of one is dependent upon the act of the others, good conscience and fair dealing require that one should not undertake secretly to procure for himself more than it is understood and agreed each and all shall have. The fact that those who do not participate in the secret arrangement receive what they were, with the lights before them, willing to take, cannot affect the question."

The judgment is affirmed.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10844. Department Two. April 4, 1913.]

WILLIAM A. ROGERS, *Respondent*, v. ALBERT VALK,
Appellant.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—CHANGING CONDITIONS—TEARING DOWN BUILDINGS—METHODS OF WORK—QUESTION FOR JURY. The doctrine of safe place to work applies to the tearing down of old buildings, where the master does not exercise reasonable care, considering the nature of the work, to eliminate unnecessary dangers, or injects unnecessary dangers into the work or place; and his negligence is for the jury, where it appears that his foreman, of thirty years experience, directed an inexperienced man to pull down with a hand line the remnants of a roof upon a floor upon which the man was standing, without making an inspection of the floor, and by a method which caused part of a heavy wall to fall upon the floor, causing it to give way, when the danger could have been obviated by removing the man and using a cable and team ordinarily used for such purposes.

SAME—ASSUMPTION OF RISKS—QUESTION FOR JURY. A workman without experience does not assume the risks, and is not guilty of contributory negligence, as a matter of law, in obeying the direct

¹Reported in 131 Pac. 231.

command of the foreman to pull down the remnants of a roof upon a floor upon which he was standing; the floor being supported on three sides by brick walls and also by a chimney, and there being no evidence that there was a safer place for him to stand and do the work; since the added danger was not so open, obvious and imminent that a reasonably prudent man would not have obeyed the order, nor that injury must necessarily result from obedience.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered August 21, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in tearing down a building. Affirmed.

Davis & Rhodes, for appellant.

Fred M. Williams and *R. M. Webster*, for respondent.

ELLIS, J.—This is an action for personal injuries. In November, 1910, the defendant Valk entered into a contract with defendant Spokane School District No. 81, for tearing down and removing the ruins of a brick high school building which had been partially destroyed by fire. For the prosecution of the work, about seventy-five men were employed by the defendant, under the superintendence of a foreman. Among these, the plaintiff, a common laborer, began work on the 12th day of November. The fire had destroyed a large part of the floors, but had left of the third floor in the southeast corner of the building a part covering a space which, so far as we are able to gather from the evidence, was about twenty feet square and supported by the south and east walls of the building on two sides, while the inner part was sustained by a chimney which had originally extended from the basement through the roof of the building, and was located at or near the inner corner of the remaining piece of floor. Two witnesses testified that the floor was supported also on the west side by an inner partition wall. While this remaining floor seems to have been damaged by fire, it was apparently considered by the foreman and the laborers as sufficiently strong for the men to work upon in removing parts of the wall above

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it and fragments of roof. The roof of the building had consisted of timbers overlaid with slate, and there was a part remaining at the southeast corner after the fire which had been the covering over a dormer closet or window. This remnant of roof was sustained by a main rafter called a hip rafter, extending about sixteen feet over the third floor, and at a distance above the floor variously estimated at from ten to fifteen feet.

As a part of the equipment for the work, the defendant had on the ground and in general use a wire cable of sufficient length to reach to the top of the walls and operated by a team of horses and a capstan or drum, which cable was used to pull down the brick walls or portions thereof. Shortly prior to the accident complained of, the foreman had caused this cable to be adjusted to the fragment of roof above mentioned, intending to pull it down, but fearing that, by reason of the timbers being firmly attached to the outer wall or gable of the dormer, the wall would also be thrown down, caused the cable to be removed, and sent a laborer to cut away the main or hip rafter and the upright supports of the dormer roof.

Late in the afternoon of November 21, the ninth day of the plaintiff's employment, and while he was at work on the third floor above mentioned, the foreman came up and directed the plaintiff and some fellow laborers to throw a rope over the end of the main rafter, which projected diagonally over the floor, and by means of the rope to pull the fragment of roof down. The evidence fairly shows that the foreman instructed the plaintiff to secure a particular rope and where to find it and use it for pulling down the roof, and thereafter immediately went below. The plaintiff procured the rope as directed, and he and two fellow laborers, after some difficulty, placed the rope over the end of the rafter and then, standing on the floor with the plaintiff nearest the middle of the floor, the three together pulled on the rope, and the roof fell, carrying with it a part of the outer brick wall or gable. Under

the weight of this roof and the mass of bricks, the floor gave way and fell through the two floors below to the basement, carrying the plaintiff with it and inflicting the injuries complained of.

At the close of plaintiff's evidence, a motion for nonsuit was made and overruled. The verdict was for the plaintiff. Each of the defendants moved for judgment notwithstanding the verdict. The motion of the school district was granted. That of the defendant Valk was denied. Judgment was entered upon the verdict, and he has appealed.

The appellant has made ten assignments of error, but they are all directed to, argued, and may be by us considered, under three heads. It is argued, (1) that there was no evidence of negligence or any violation of duty on the appellant's part; (2) that the respondent assumed the risk of the danger which resulted in his injury; (3) that the respondent was guilty of contributory negligence.

The negligence charged was that the appellant failed to exercise reasonable care to furnish the respondent a reasonably safe place in which to work, and that the plan of work adopted was unnecessarily dangerous. The appellant contends that the safe place doctrine is not applicable where the conditions of work must of necessity be constantly changing as in the tearing down of an old building. Two cases are cited in which the doctrine is broadly stated that "the work of tearing down an old building . . . is almost necessarily attended with danger, and in such case the rule that it is incumbent on the master to furnish to the servant a reasonably safe place in which to work does not apply as in ordinary cases." *Western Wrecking & Lumber Co. v. O'Donnell*, 101 Ill. App. 492; *Merchant v. Mickelson*, 101 Ill. App. 401. While the rule thus broadly stated is supported by these and many other authorities from other jurisdictions which might be cited, it has never been adhered to by this court and seems to us as indefensible in logic as it is pernicious in practice. It ignores the humane considerations which under-

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lie the rule. The safe place doctrine is the correlative of the doctrine of assumption of risk. The one cannot be defined without a clear apprehension of the scope of the other. The servant assumes those risks which are open and obvious and necessarily incident to the work, but only those. The master is chargeable with the result of dangers by him unnecessarily injected into the work or place of work. The safe place doctrine simply stated is just this: It is the duty of the master to exercise reasonable care, considering the nature of the work in hand, to eliminate from the place of work unnecessary dangers; that is to say, it is his duty to use reasonable care to make and keep the servant's environment reasonably safe so far as compatible with the practical performance of the work. It seems neither logical nor humane to hold that, while ordinarily it is the duty of the master to exercise reasonable care to eliminate unnecessary dangers, still where the necessary dangers are more numerous by reason of the nature of the work, and because they are by the constantly changing conditions necessarily augmented from time to time, therefore the master is absolved from the exercise of any care to eliminate the unnecessary dangers. The true distinction is, we believe, that announced in *McLeod v. Chicago, Milwaukee & P. S. R. Co.*, 65 Wash. 62, 117 Pac. 749, where we said:

"It is next contended that the safe place rule has no application to the situation here presented, because the false work was being removed and the conditions were necessarily changing and dangerous, as in the construction, demolition or repair of a building. But the servant does not assume the risk of every danger even in such cases. As in other cases, he assumes the risk of such dangers only as are necessarily incident to the work. The difference is not in the rule but in the greater number of dangers incident to the work. The real question in any case is as to what constitutes reasonably careful conduct on the part of the master looking to reasonable safety for the men."

In *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. 1058, we expressed the same view as follows:

"If it is a master's duty to furnish the servant a safe place in which to work, it is just as much his duty to furnish that safe place, where the work to be performed is the demolition or tearing down of a building, as where it is its construction in the first instance."

See, also, *Etheridge v. Gordon Const. Co.*, 62 Wash. 256, 113 Pac. 639.

Under the rule so stated, whether upon the evidence the appellant was guilty of negligence was a question for the jury. The foreman was a man of thirty years' experience in the construction and demolition of buildings. The respondent had had little experience in such work. The floor in question seems to have been reasonably safe for the men to walk over and work upon, but not for the precipitation upon it of the roof of the dormer and bricks of the gable. The foreman testified that the weight of the hip or dormer roof falling "would not have affected the floor any," but that when the gable wall fell also, it caused the fall of the floor. That he appreciated this danger beforehand is evidenced by the fact that he ordered the timbers of the roof, which were imbedded in the wall, cut away. Yet when he ordered the men to pull the roof down with a hand line, he made no inspection to see if these timbers had been sufficiently cut. The evidence tends to show that he called the men away from the cutting of these timbers before that work was completed. He also testified that there was a certain narrow strip of floor to the west of the partition wall supporting the west side of the floor where the men stood, upon which they might have stood with safety in pulling the roof down, but he did not call the respondent's attention to this, and there is no evidence that the respondent knew that this strip was any safer than the rest of the floor. In fact, the evidence as to the existence of this safe strip is vague and unsatisfactory. The evidence shows that the roof could have been pulled down with the cable

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provided for and ordinarily used for such work with perfect safety to the men. One of the men who claims to have assisted the respondent in pulling the roof down testified that he suggested the use of the cable, but the foreman said, "No, you can pull it all right with the rope." The foreman denied this, and also denied that the man in question was there at all. But the credibility of the witnesses was clearly for the jury. In view of these things, it was for the jury to say whether, by the plan of work adopted or by the failure to tell the men of a safer place to stand, of which there is no evidence that they knew, the foreman did not inject into a necessarily hazardous work an added and unnecessary danger. Unquestionably it was the duty of the foreman, as representing the master, to inspect and satisfy himself that the floor would sustain the added weight, or to direct the respondent to a reasonably safe place to stand, if there was such a place, while performing the order. If neither of these courses would furnish reasonable safety, then it was the master's duty to use the cable as usual, or adopt some other reasonably safe plan. The failure to do any of these things was a failure to exercise reasonable care.

The next question is, Did the respondent assume the risk of this added danger as a matter of law? He was acting under a direct order from the foreman. The rope used, which was only thirty or forty feet long, was the specific rope which the foreman directed to be used. He knew that with such a rope the men must stand somewhere upon the floor to do the work as ordered. If there was a safer place to stand than where they stood, there is no evidence that the respondent and the other two men knew of it, and the evidence is positive that the foreman did not tell them of it though he claims to have had it in mind. In executing the foreman's order, the respondent proceeded exactly as he was warranted in interpreting that order. In such a case, the questions of assumption of risk and contributory negligence approach each other so closely as to blend and be determinable upon

the same principles. The servant assumes the risk of obedience, or is guilty of contributory negligence in obeying the order, only when the added danger so incurred is open, patent and obvious alike to man and master, and so plain that reasonable men might not differ as to its existence, and so imminent that a reasonably prudent man would not obey the order.

"In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from obedience to the order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order." 1 Labatt, Master and Servant, p. 1241, § 439.

See, also, *Waterman v. Skokomish Timber Co.*, 65 Wash. 234, 118 Pac. 36; *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900; *Campbell v. Winslow Timber Co.*, 66 Wash. 507, 119 Pac. 832; *Offutt v. World's Columbian Exposition Co.*, 175 Ill. 472, 51 N. E. 651; *Gundlach v. Schott*, 192 Ill. 509, 61 N. E. 332, 85 Am. St. 348. Considering the fact that the floor was supported on three sides by brick walls and also by the chimney, and the evident belief of the experienced foreman, as implied by his order, that the floor would sustain the added weight which the execution of the order would obviously impose, we cannot say that reasonably prudent men might not well differ as to the danger which would result from obedience to the order. The question of assumption of risk was one for the jury.

The respondent was not guilty of contributory negligence in obeying the order unless there was a safer place to stand, and he knew of that fact. Of this, there was no evidence so conclusive as to take the question from the jury. If there was a more secure strip of floor on which he might have stood, there was no evidence that he knew of it. It is suggested that he might have stood upon the fire escape, but there was absolutely no evidence that such a course would have been

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practicable. It is also suggested that he might have stood upon the wall of the building, but this was obviously impracticable. When the dormer gave way in response to the pull, the danger of falling from the wall would seem more obvious than the danger that the floor would fall. Upon the whole record, it seems to us that the questions of negligence, contributory negligence, and assumption of risk were all for the jury, under proper instructions. The instructions given fairly covered the law as we conceive it to be as applied to the facts.

The judgment is affirmed.

MAIN, FULLERTON, MORRIS, and MOUNT, JJ., concur.

[No. 10627. *En Banc*. April 4, 1913.]

GEORGE E. WRIGHT, *as Executor etc., Respondent*, v.
HENDRICK SUYDAM, *Appellant*.¹

VENDOR AND PURCHASER—CONTRACTS—AGREEMENT TO PURCHASE OR OPTION—CONSTRUCTION. A contract acknowledging receipt of the sum of \$100 as part payment upon the purchase price of land, followed by provisions contemplating the consummation of the sale, and providing that the purchaser, if the title shall be found insufficient or unsatisfactory, may at his option have the sums paid returned to him, is a contract for the sale and purchase of the land and not an option, notwithstanding a provision that if the title is not subject to objection and the purchaser fails to perform his part of any of the terms of the contract, the sums paid shall be retained by the owner as liquidated damages and the purchaser shall not be under any further liability.

SPECIFIC PERFORMANCE—MUTUAL OBLIGATIONS—RIGHT TO RESCIND. A contract for the sale of land is not so lacking in mutuality that the law will not enforce specific performance, from the fact that it provides that the purchaser may rescind in case the title is not satisfactory to him, since he would be compelled to accept a marketable title.

SAME—MUTUALITY OF OBLIGATION. A contract for the sale of land is not so lacking in mutuality that it cannot be specifically enforced

¹Reported in 131 Pac. 239.

from the fact that the purchaser may satisfy all obligations on his part by forfeiting the sum of \$100 paid as part of the purchase price, that being a sufficient consideration for the owner's obligation to convey.

SAME—MUTUALITY—SIGNATURE BY ONE PARTY. A contract signed by only one of the parties is not for that reason lacking in mutuality.

SAME—MUTUALITY OF REMEDY. Equity will not refuse specific performance of a contract for the sale of land because of the fact that a mutuality of remedies was not provided in the contract, where the contract was fully executed on the part of the plaintiff at the time of filing the bill.

VENDOR AND PURCHASER—CONTRACT—PERFORMANCE OR BREACH—TENDER. Where a contract for the sale of land made the payment of the balance of the purchase price and the execution of the conveyance mutual, concurrent, and dependent acts, a tender of the purchase price before demand and offer of a deed is in time, although after the time limited in the contract.

SPECIFIC PERFORMANCE—DEFENSES—TITLE OF VENDOR—VOLUNTARY DISQUALIFICATION TO PERFORM. It is not a defense to specific performance of a contract to convey land that the defendant voluntarily disqualified himself from vesting title by conveying the land to a third person, where the plaintiff is proceeding upon the theory that he is not disqualified and is willing to take a conveyance from the defendant in accordance with the terms of the contract.

ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING—DISMISSAL OF FORMER ACTION WITHOUT PREJUDICE—EFFECT. A plea of another action pending cannot be sustained, where prior to the trial the former action had been dismissed without prejudice, although it was pending at the time of the commencement of the second action.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 29, 1912, upon findings in favor of the plaintiff, in an action for specific performance, after a trial to the court on the merits. Affirmed.

John W. Roberts and *C. J. France* (*Frederick Bausman*, of counsel), for appellant, contending, among other things, that the agreement was an option and not a contract to purchase lands, cited: 21 Am. & Eng. Ency. Law (2d ed.), 924; *Jones & Co. v. Eilenfeldt*, 28 Wash. 687, 69 Pac. 868; *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Indiana & A. Lum. Co. v. Pharr*, 82

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Ark. 573, 102 S. W. 689; *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. 17; *Delano v. Saylor* (Ky. Law), 113 S. W. 888; *Sandberg v. Light*, 55 Wash. 189, 104 Pac. 205; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Milwaukee Mechanics' Ins. Co. v. Rhea & Son*, 123 Fed. 9; *McMillan v. Philadelphia Co.*, 159 Pa. St. 142, 28 Atl. 220; *Rude v. Levy*, 43 Colo. 482, 96 Pac. 560, 127 Am. St. 123, 24 L. R. A. (N. S.) 91; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403.

Wright, Kelleher & Caldwell and *Edward W. Allen*, for respondent.

PARKER, J.—This action was commenced on May 16, 1910, by W. Hammond Wright against Hendrick Suydam, to enforce specific performance of the following written contract:

“Received of W. Hammond Wright the sum of one hundred dollars as part payment upon purchase price of the following described real estate with the appurtenances thereto, situate in King county, state of Washington, to wit: . . . the balance of the purchase price of the said premises is seventy-nine hundred dollars to be paid in cash, upon delivery of deed. The undersigned owners of said premises agree within fifty days to deliver to the purchaser an abstract of title prepared and certified by a reputable and approved abstract company, showing title to said property in said owners in fee simple free from all liens and encumbrances as herein stated, and good and marketable, and to convey such title to the purchaser, his heirs or assigns, by warranty deed prepared by the purchaser with full covenants satisfactory to the purchaser. If upon investigation title to the said premises shall be found to be insufficient in any of the respects aforesaid, either in fact or as shown in the abstract, or shall be unsatisfactory to the attorney for the purchaser, the purchaser may at any time thereafter at his option elect to have the sums of money theretofore paid by him as part payment of the purchase price, immediately repaid to him, and in the event of such election the owners shall return such sums and all further obligation upon their part shall then cease; provided, however, that such election cannot be exercised until after thirty

days after the objections to title are pointed out in writing to the owners, which length of time is allowed to them to remedy the same. If title to the said described premises shall not be subject to objection in any of the respects aforesaid, and shall be satisfactory to the attorney for the purchaser and the purchaser shall fail upon his part to perform any of the terms of this agreement, then the said sum of money first above mentioned shall be retained by the undersigned owners as liquidated damages, and they shall also be entitled to a return to them of the said abstract, and neither party shall be under any further liability. Deed is to be executed immediately upon examination of abstract, or within time allowed to owners to cure objections. Purchaser is to have twenty days after delivery of abstract within which to examine title. Time is of the essence of each of the provisions of this agreement. Dated at Seattle, Washington, this August 14, 1908.

“(Sig.) Hendrick Suydam, Owner.”

The cause was tried and submitted to the court upon the merits on October 25, 1910, when it was taken under advisement by the court. Thereafter on May 26, 1911, W. Hammond Wright died in King county, being then a resident thereof, leaving a will wherein George E. Wright was named as executor and trustee, and whereby the land here involved was devised to him as such. Thereupon George E. Wright as such executor and trustee was substituted as plaintiff. On April 29, 1912, findings of fact and conclusions of law were made and filed by the court in favor of the plaintiff and against the defendant, and a decree rendered accordingly as prayed for. From this disposition of the cause, the defendant has appealed to this court.

The facts are in substance as follows: The contract above quoted was entered into between Suydam and Wright on August 14, 1908, the date it bears, and \$100 then paid by Wright to Suydam upon the purchase price of the land as therein stated. At that time the legal title thereto was held by the Stevenson-Sanders Land Company, a corporation, it being about nine acres of a forty-acre tract owned by that company. Suydam's interest in the land at that time was

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under a contract for the purchase of the entire forty-acre tract, theretofore entered into by him with that company, upon which contract he had paid only a part of the purchase price. The nature of Suydam's interest in the land at that time became known to Wright a short time thereafter. The following, among other findings, were made by the court:

"On or about the fifth day of September, 1908, as provided in the said agreement, the defendant delivered the said abstract of title to the attorney for the said W. Hammond Wright, but before the time allowed by the said agreement for the examination thereof had elapsed, negotiations arose between the said W. Hammond Wright and the defendant with respect to a modification of the terms of the said agreement proposed for the purpose of accommodating the same to certain alleged defects in title, and thereupon the defendant by express language as well as by conduct, agreed that the time for the examination of the said abstract and for the performance of the terms of the said agreement by said W. Hammond Wright should be extended for a reasonable length of time. Thereafter, and before the expiration of such reasonable time, and while such negotiations were still in progress, and without any intimation of his desire to terminate them, the defendant went to the office of the attorney for the said W. Hammond Wright, during the attorney's absence, and withdrew the said abstract, and upon the nineteenth day of October, 1908, delivered the same to one William Pitt Trimble, with whom the defendant unbeknown to the said Wright, was then negotiating a sale of the said premises. The said William Pitt Trimble, with full knowledge of the said contract referred to in paragraph three preceding, purchased the said premises and at his request and as a part of the transaction in question, the defendant Suydam upon the twenty-fourth day of October, 1908, entered into a written contract to convey the said premises, together with other premises, to his mother-in-law, Catherine O. Denny, and upon the same day, and as a part of the same transaction, the said Catherine O. Denny assigned the contract last mentioned to the said William Pitt Trimble, and upon the sixteenth day of May, 1910, the defendant Suydam, pursuant to the said contract and assignment thereof, executed a warranty deed of the premises in question to the said William Pitt Trimble.

“Upon the twenty-second day of September, 1908, without informing him of his negotiations with the said Trimble, the defendant requested the said W. Hammond Wright to receive back the said deposit of one hundred dollars (\$100) and to consider the said agreement of August 14, 1908, cancelled. This request the said W. Hammond Wright refused. At no previous time had the defendant signified an intention or desire to cancel the said agreement or to repay the said deposit money and at no time either before or after this date did the defendant tender performance of the terms of the said agreement set forth in paragraph three by him to be performed, or demand performance of the terms of the said agreement to be performed by the said W. Hammond Wright.”

On September 26, 1908, Wright commenced an action in the superior court for King county against Suydam and the Stevenson-Sanders Land Company, seeking specific performance of the contract, and filed notice of the pendency thereof in the office of the auditor of King county. A trial of that action in the superior court resulted in judgment in favor of Suydam, denying the relief prayed for. Appeal was thereupon taken by Wright from that judgment, which was thereafter affirmed by this court. Upon petition for rehearing, this court modified its decision of affirmance, to the extent of directing the superior court to vacate its judgment, and in lieu thereof enter a judgment dismissing the action without prejudice to the right of appellant therein to commence a new action. This disposition of that case in this court may be found in *Wright v. Suydam*, 59 Wash. 580, 108 Pac. 610, 110 Pac. 8. Judgment of dismissal without prejudice was accordingly entered in that action by the superior court after the commencement of this action.

On September 28, 1909, after the rendering of the first judgment in the superior court and before the commencement of this action, Suydam acquired title to the land by conveyance from the Stevenson-Sanders Land Company, in pursuance of his contract with that company. This deed

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of conveyance was recorded in the office of the auditor of King county on February 19, 1910. Wright did not receive knowledge of the execution of this deed until after its recording. On May 16, 1910, Wright caused to be prepared a deed of conveyance for execution in pursuance of his contract with Suydam, presented it to Suydam, tendered him the balance of the purchase price, and demanded that he execute the deed, which tender and demand were refused. Thereafter, on the same day, this action was commenced in the superior court, and notice of the pendency thereof duly filed in the office of the auditor of King county. On the same day, as we have already noticed, Suydam executed a deed of conveyance for the land to William Pitt Trimble. This deed was not recorded in the office of the auditor of King county until some time later. In this and the former action Wright's wife was joined as plaintiff, but she has disclaimed all interest in the controversy and hence we have not referred to her as a party.

The argument of counsel for appellant upon the questions of fact involved is directed particularly to the finding of the trial court that there was an agreed extension of time for the examination of the abstract and the consummation of the sale. It is insisted that this finding is not warranted by the evidence, and also that such a contract would have to be in writing to become legally binding, in the light of the statute of frauds, since it would involve the modification of a contract for the sale of lands. The view we take of the nature of the contract and of the respective rights thereunder, which will be hereafter noticed, renders it unnecessary for us to follow this contention and determine whether there was any such agreement then made, binding in law. There are, we think, other controlling facts touching the life and vitality of the contract after the expiration of the times therein specified for doing the things agreed to be done upon the part of the respective parties; that is, the fact that at no time did Suydam ever tender performance of the contract to Wright

or demand any performance thereof from Wright, and the fact that Wright never at any time claimed rescission of the contract because of defective title. These facts were in effect found by the trial court, and we think are fully sustained by the evidence. We are satisfied from the evidence that the request made by Suydam of Wright for the return of the \$100 paid upon the purchase price was not made or claimed as a matter of right, nor upon the ground of failure on the part of Wright to perform his part of the contract. We notice this fact in view of the language of the finding above quoted, which might be considered as not clear in this regard.

The argument of counsel for appellant upon the questions of law involved in the merits of the case proceeds upon the theory that the contract amounts to no more than a mere option to purchase, under which Wright's privilege of purchase ceased upon the expiration of the time agreed upon for his examination of the abstract, assuming that he did not then elect to exercise his option, without any notice or claim given or made by Suydam to Wright looking to the termination of the option, and that, viewed as a contract for the sale of the land, the contract lacks mutuality and therefore cannot be enforced as such.

That the contract is not an option in form, is apparent from a casual reading of it. It is expressly stated therein that the \$100 was received from Wright as part payment upon the purchase price of the land, followed by provisions clearly contemplating the consummation of a sale of the land from Suydam to Wright, amounting to an agreement on the part of Suydam to sell and on the part of Wright to purchase. The argument is in substance that Wright cannot, under the terms of the contract, be compelled to specifically perform; that is, that he cannot be compelled to take the land and pay the balance of the purchase price even though the title is satisfactory to him; that the only remedy available to Suydam is that he may retain the \$100 paid upon the purchase price as liquidated damages resulting from Wright's

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failure to perform, and that therefore the contract is in substance a mere option. This is a plausible argument, but loses sight of the substance of the contract and rests solely upon the provisions thereof relating to the remedy available to Suydam in the event Wright fails to perform. The fact remains, however, that the contract constitutes an agreement on the part of Suydam to sell, and on the part of Wright to purchase, the land. This, we think, distinguishes it from a mere option contract, which upon the failure of the prospective purchaser to exercise his option rights within the time agreed upon would automatically cut off such right without any notice given or demand made for performance by the owner of the land. In 1 Warvelle on Vendors (2d ed.), §125, the distinction between an option and a contract for sale is commented upon as follows:

“There is a marked distinction between an option of sale and a contract for sale, although such distinction is frequently overlooked. If without consideration an option is a mere proposal which may be retracted at any moment; if given for a consideration it amounts to nothing more than a privilege to purchase at a certain price or within a certain time. It is not a sale; it is not even an agreement for a sale; at best it is but a right of election in the party receiving same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. If based upon a consideration it cannot be extended beyond the time limited without a new consideration, and even though this is attempted and such extension is evidenced by a writing it is still *nudum pactum* and void.”

See, also, 39 Cyc. 1232; 21 Am. & Eng. Ency. Law (2d ed.), 981.

Now the fact that the contract by its terms confines Suydam's remedy against Wright to the recovery of liquidated damages—and that is what the right to retain the \$100 paid upon the purchase price in effect amounts to—does not change the fact that the contract is on Suydam's part a promise to sell and on Wright's part a promise to purchase. An agreement in a contract, specifying and limiting the par-

ticular remedy available to a party to the contract upon the breach thereof by the other, does not change the respective mutual promises which constitute the substance of the contract. Wright did not contract and pay for a mere privilege to purchase land at a future time, but he agreed to purchase and paid part of the purchase price. We are of the opinion that the contract is one for the sale of land, both parties being bound thereby as seller and purchaser, respectively, though the remedy of Suydam upon breach by Wright may be confined to liquidated damages. Our decisions in *Jones & Co. v. Eilenfeldt*, 28 Wash. 687, 69 Pac. 368, and *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131, cited and relied upon by counsel for respondent, are not opposed to this view, since the contracts therein involved and regarded as options contained no agreement whatever, either express or implied, on the part of the prospective purchasers to purchase.

Viewed as a contract for the sale of the land, do its terms disclose, (1) such want of mutuality of obligation from each party to the other that the law will decline to recognize it as a binding contract; or (2) such want of mutuality of remedy, available to each of the respective parties upon a breach by the other, that the law will not enforce specific performance against Suydam in favor of Wright because such remedy would not be available to Suydam upon a breach by Wright? It is insisted that such want of mutuality of obligation is evidenced by the terms of the contract providing that the title should be satisfactory to Wright; and that he may, upon the title proving unsatisfactory to him, however arbitrarily he decides that question, have returned to him the \$100, and in that manner rescind the contract. In so far as the fact that the terms of the contract make the consummation of the sale dependent upon title being satisfactory to Wright is concerned, we think that he is not, by the terms of the contract, entitled to arbitrarily reject the title. This question was reviewed by us in *Dean v. Williams*, 56 Wash. 614, 106 Pac. 130, where there was involved a con-

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tract quite similar to this in so far as the right of the purchaser to reject the title is concerned. We held in that case that the purchaser did not have the right to arbitrarily reject the title, notwithstanding the contract seemed in terms to so provide; but that he was bound to accept a good, marketable title. See, also, *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499. We think that Wright was, in this respect, bound by the terms of the contract to the extent of being liable to forfeit the \$100 paid upon the purchase price as liquidated damages, so that there was no lack of mutuality of obligation in this respect. Nor do we think there was any lack of legal mutuality of obligation because of the fact that Wright may satisfy all obligations of the contract upon his part to perform by forfeiture of the amount paid upon the purchase price. His obligation to forfeit this sum was a sufficient consideration to support the promise made by Suydam to convey, upon the payment of the balance of the purchase price. Clearly this was sufficient mutuality of obligation. It also seems plain, under our former decisions, that the fact that the contract was unilateral in form, being signed only by Suydam, would not show a want of mutuality. *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 85 Pac. 338, 114 Am. St. 137; 36 Cyc. 623, 624.

The question of want of mutuality of remedies, as affecting appellant's right to enforce specific performance of the contract as well as by an action to recover damages, is one, at first thought, of seeming difficulty, in view of the fact that Suydam's remedy for a breach on the part of Wright is limited to liquidated damages, measured by the amount paid upon the purchase price. Counsel for appellant invoke the general rule that there must be mutuality of remedy as well as of obligation in order to enable either party to invoke the remedy of specific performance. In 2 Pomeroy's *Equitable Remedies*, § 769 (Supplementary to Pomeroy's *Equity Jurisprudence*), the learned author states the rule, which seems to be subject to numerous exceptions, as follows:

"The frequent statement of the rule of mutuality,—'that the contract to be specifically enforced must as a general rule, be mutual,—that is to say, such, that it might, at the time it was entered into, have been enforced by either of the parties against the other,' is open to so many exceptions that it is of little value as a rule. But in view of the firm place that the doctrine of mutuality has obtained in the courts of equity, it seems well to attempt a restatement that shall be more free from exceptions. The following form seems to meet the cases generally. If, at the time of the filing of the bill in equity, the contract being yet executory on both sides, the defendant, himself free from fraud or other personal bar, could not have the remedy of specific performance against the plaintiff, then the contract is so lacking in mutuality that equity will not compel the defendant to perform but will leave the plaintiff to his remedy at law. This rule, it is believed, covers the circumstances in equity where, according to the weight of authority, the court refuses its aid for lack of mutuality. So far as there is a principle of mutuality, it is a mutuality of remedy in equity at the time of filing the bill that is required, and not a mutuality in the terms of the contract when the contract is made. Equity is entirely willing to grant plaintiff the performance he applies for, but if it finds that in doing so the defendant, without fault, is left in turn to a remedy at law only, it refuses to lend its aid to such an unequal result. Therefore any original lack of mutuality in the terms of the contract will have no influence if the court finds that giving the plaintiff his relief will no longer leave the defendant to the law for relief."

Now it is apparent that Suydam will, in this controversy, not be left to his remedy at law. Indeed, in view of the fact of Wright's tender, which has at all times been kept good, Suydam will not require any remedy, at either law or equity, to enforce his rights. He is in substantially the same position as if respondent had entirely performed his part of the contract, including that part which was not specifically enforceable against him. One of the numerous exceptions to the rule is where the plaintiff's unenforceable promise has been performed. In 2 Pomeroy's *Equitable Remedies*, § 771, the author further observes:

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"So long as such a contract remains executory, the filing of the bill does not make the remedy mutual, and in these cases equity refuses specific performance against the defendant because of the lack of mutuality; in fact, because it would leave defendant in the unjust position of having no assurance of performance on plaintiff's part. But that equity is concerned only with the mutuality at the time of filing of the bill is clearly shown by those cases where the contract is *executed* on plaintiff's part. The terms are the same, but defendant would no longer need to trust an inadequate remedy at law, and equity compels him to perform."

In the text of 36 Cyc. 631, the rule is stated as follows:

"If the plaintiff has performed his unenforcible promise the fact that before such performance there was a lack of mutuality in the remedy is no defence."

Numerous cases are there cited in support of the text. The case of *Brown v. Munger*, 42 Minn. 482, 44 N. W. 519, is in principle much like this. There the defendant was seeking specific performance by his answer in a suit to cancel the contract. It appeared that the contract would have been unenforcible in equity on the part of the plaintiff because certain land which he was to receive as part consideration for the performance of the contract on his part was not described, but was to be selected by the defendant, and was to be of a certain kind and within a certain distance of a railroad. Disposing of the contention that, by reason of this fact, there was a want of mutuality of remedies, the court observed:

"In the case at bar, although the contract may have been originally, as regards its performance by the defendant, beyond the jurisdiction of the court, the only obstacle in the way has been removed in the manner provided for by the terms of the agreement. The defendant alleges in his answer that he has selected out, set apart, and appropriated to the contract, as he was authorized to do, certain described tracts of land, completely answering the requirements of the instrument as to quantity, quality, and location; that he has properly executed and tendered conveyances thereof, and in all things stands prepared and willing to perform the contract

on his part. Upon the allegations of the answer, there is absolutely nothing in the way of a decree which will fully and equitably protect and enforce the rights of both parties. If these allegations prove true, defendant is entitled to specific performance."

We are of the opinion that, at the time of the commencement of this action and since then, by reason of Wright's tender, the defense of want of mutuality of remedies is not available to Suydam in this action. Indeed, he is in such a situation that he needs no remedy, except that the appellant's tender be kept good, and this is properly provided for in the decree.

Had the contract lost its vitality, and the further right of the parties thereunder come to an end, at the time of the tender of the balance of the purchase price on the date of the commencement of this action? We have seen, that on that day Wright tendered to Suydam the full amount of the balance of the purchase price at the same time demanding a deed in pursuance of the contract; that Suydam had not theretofore at any time offered to perform, or made any demand upon Wright to perform, the contract and that Wright had not theretofore sought to rescind on account of defective title. It is plain from the terms of the contract that the payment of the balance of the purchase price and the conveyance of the land to be made by Suydam to Wright are mutual, concurrent, and dependent acts, to be performed by the respective parties at the same time. Under our repeated holdings, these facts would prevent Suydam from successfully claiming that Wright is not entitled to a conveyance, as provided by the terms of the contract. See *Lewis v. Wellard*, 62 Wash. 590, 114 Pac. 455, where our former decisions on the subject are reviewed.

It is insisted by counsel for appellant that respondent cannot have a decree for specific performance, because appellant did not have, at the time of the rendering of the decree, and has not since then had, any title to convey. In view of

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the fact that appellant has voluntarily disqualified himself from performing his contract to whatever extent he may be so disqualified, the fact that respondent is not asking damages in lieu of a conveyance from appellant but is willing to take a conveyance from him in compliance with the terms of the contract, and that respondent is resting his right upon the theory that appellant has *not* disqualified himself from conveying in pursuance of the terms of the contract, we think that appellant cannot now be permitted to say that any conveyance he might now make in pursuance of the contract will not vest title in respondent. Appellant may have divested himself of title by conveyance to Trimble to the extent of estopping himself to claim title as against Trimble, but that does not prevent respondent from proceeding upon the theory that appellant is not disqualified from performing the contract by conveyance in pursuance of its terms. Surely appellant cannot be permitted to avoid performance by claiming disqualification to perform, when such performance does not involve any act of greater difficulty than the mere execution of a deed. There is nothing rendering even slightly difficult the execution by appellant of a deed such as this contract calls for. We would have here a quite different question if respondent were asking for a conveyance or damages, in the alternative, and were conceding disqualification to perform on the part of appellant. We are not here concerned with any controversy which may arise between respondent and Trimble after conveyance is made to respondent in pursuance of this contract. Enough appears, however, to show that, by reason of Trimble's notice of respondent's rights under this contract, respondent's claim of right as against Trimble is apparently not unfounded. No authority has been called to our attention touching this contention of appellant. We think, however, it is fully answered by the remarks of Prof. Pomeroy in his *Specific Performance of Contracts* (2d ed.), § 438, as follows:

"The general doctrine is firmly settled, both in England and in this country, that a vendor whose estate is less than or different from that which he agreed to sell, or who cannot give the exact subject-matter embraced in his contract, will not be allowed to set up his inability as a defense against the demand of a purchaser who is willing to take what he can get with a compensation. The vendee may, if he so elect, enforce a specific performance to the extent of the vendor's ability to comply with the terms of the agreement, and may compel a conveyance of the vendor's deficient estate, or defective title or partial subject-matter, and have compensation for the difference between the actual performance, and the performance which would have been an exact fulfillment of the terms of their contract."

The fact that compensation is not here sought does not lessen the force of this doctrine as applicable here.

At the time this action was commenced, the former action against Suydam and the Stevenson-Sanders Land Company to enforce specific performance of this contract was still pending in this court upon appeal; that is, while our original opinion had been filed, deciding the case against Wright, it was not then finally disposed of upon rehearing, and of course no formal judgment of dismissal without prejudice had then been entered in the superior court, as directed by us in disposing of the petition for rehearing. Upon these facts, Suydam sought an abatement of this action upon the ground of another action pending, and now insists that the trial court erred in not dismissing this action for that reason. There is some controversy as to the question of abatement being timely raised in this action, by proper motion or plea. However that may be, it appears that our decision upon the rehearing of the former case, directing its dismissal without prejudice, was rendered August 6, 1910, and the formal order of dismissal was entered in the superior court on October 18, 1910, while the trial of this action occurred October 25, 1910. It is apparent, then, that no other action was pending at the time this action was tried upon the merits.

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In the text of 1 Cyc. 25, the prevailing rule touching abatement under such circumstances is stated as follows:

"The tendency of the later cases and a preponderance of authority sustain the doctrine that it is a good answer to a plea of the pendency of a prior action for the same cause that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea. Under this doctrine the plea will be overruled unless the prior suit is pending at the time of the trial of the second."

This is in harmony with the remarks of Justice Dunbar, made in *Harris v. Fidalgo Mill Co.*, 38 Wash. 169, 80 Pac. 289, where he said:

"It is not enough to show that another action is pending, but it must appear that such action would be liable to become vexatious, and also that full relief could have been obtained in the former action."

It is plain that the former action could not have been vexatious nor afford the relief here sought by respondent, at any time after the commencement of this action. It is worthy of note in connection with what we have here said, that the former action was against both Suydam and the Stevenson-Sanders Land Company. The thing sought in that action was not conveyance from Suydam alone, but conveyance from Suydam and the Stevenson-Sanders Land Company. This relief, it was manifest, could not be granted in that action, because the land company had not then received the purchase price, and therefore it could not be compelled to convey. Had the relief there sought been only a conveyance from Suydam, the questions involved would have been quite different. It is true that, in our opinion, in *Wright v. Suydam*, 59 Wash. 530, 108 Pac. 610, 110 Pac. 8, we said that "a decree requiring Suydam to convey would be an idle and fruitless thing." This remark, however, was not necessary to a decision of any question there involved, and since the writer of this opinion was the writer of that one, he feels free to say here that the language quoted should not have been there used.

We conclude that the decree of the learned trial court properly disposed of the rights of the parties here involved, and that it should be affirmed. It is so ordered.

Crow, C. J., Mount, Fullerton, Gose, Morris, Ellis, and Main, JJ., concur.

[No. 9590. Department One. April 4, 1913.]

F. W. PEABODY *et al.*, Respondents, v. THE CITY OF EDMONDS
et al., Appellants.¹

APPEAL—DECISION—RECALL OF REMITTITUR—GROUNDS—JURISDICTION. The supreme court loses jurisdiction of the cause when the remittitur goes down, and cannot recall the remittitur except for the purpose of correcting a mistake or enforcing its judgment.

SAME—DECISION—RECALL OF REMITTITUR—DELAY. A motion filed March 6th, 1913, to recall a remittitur sent down on July 3d, 1912, will be denied for want of due diligence.

Motion to recall a remittitur, filed in the supreme court March 6, 1913. Denied.

George W. Louttit, for appellants.

Coleman, Fogarty & Anderson, for respondents.

PER CURIAM.—In this cause an opinion was filed on June 1, 1912 (68 Wash. 610, 123 Pac. 1018). The remittitur was sent down on July 3, 1912. Thereafter on March 6, 1913, the appellants filed in this court a motion to recall the remittitur in order that a further opinion may be filed directing and instructing the city council as to the manner in which a new assessment shall be cast, and advising them as to what interest shall be allowed on special warrants heretofore issued.

This court lost jurisdiction of the cause when the remittitur went down. For the purpose of correcting a mistake, or en-

¹Reported in 131 Pac. 250.

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forcing its judgment, this court may recall a remittitur, if application therefor is made with due diligence. *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *State ex rel. Burke v. Board of Com'rs*, 61 Wash. 684, 112 Pac. 929.

There is no contention that any mistake was made in the original opinion, nor has application for a recall of the remittitur been made with due diligence. The motion is denied.

[No. 11024. Department One. April 5, 1913.]

CASEY-HEDGES COMPANY, *Appellant*, v. T. F. WILCOX,
Receiver etc., Respondent.¹

CORPORATIONS—RESIDENCE—CONDITIONAL SALES BY CORPORATION—FILING—COUNTY OF RESIDENCE. The principal place of business of a corporation designated as required by law in its articles of incorporation must be held to be its "residence," within Rem. & Bal. Code, § 3670, requiring conditional sales contracts to be filed with the auditor of the county wherein the vendee resides.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered August 6, 1912, dismissing an action of replevin, after a trial upon stipulated facts before the court without a jury. Affirmed.

O. M. Nelson, for appellant.

B. G. Cheney and *Hayden & Langhorne*, for respondent.

PER CURIAM.—This is an action to recover the possession of certain personal property which it is asserted the plaintiff sold to the Syverson Lumber & Shingle Company, a corporation, on a conditional sale contract, which was filed in the office of the county auditor of Chehalis county within the time provided by statute, Rem. & Bal. Code, § 3670. In its articles of incorporation, the Syverson Lumber & Shingle Company designated the city of Tacoma, in Pierce

¹Reported in 131 Pac. 205.

county, as its principal place of business. "The principal place of business must be held to be the residence of the corporation." *First Nat. Bank v. Wilcox*, ante p. 473, 130 Pac. 756, 131 Pac. 203. The contract was not filed in the county wherein "at the date of the vendee's taking possession of the property the vendee resides." Upon the authority of the case cited, the court correctly held that the plaintiff had no cause of action.

The judgment is affirmed.

[No. 10792. Department One. April 5, 1913.]

CARL JENSEN, *Appellant*, v. WILLIAMS COMPANY *et al.*,
Respondents.¹

WORK AND LABOR—ACTION FOR SERVICES—EVIDENCE—SUFFICIENCY. In an action for services, the evidence shows that the plaintiff knew he was employed by the S. Company and not by the W. Company, two corporations having a common office and common officers, where he admitted that for nine months he served as foreman for the S. Company, kept its time books, issued time checks and received checks for himself and colaborers upon which plainly appeared the name of the S. Company, and that after leaving such company he worked for and was paid by the W. Company.

TRIAL—DIRECTION OF VERDICT. Where there is no substantial evidence tending to establish the cause of action sued on, it is proper to direct a verdict for the defendant.

Appeal by plaintiff from a judgment of the superior court for Snohomish county, Yakey, J., entered July 3, 1912, in favor of the plaintiff by direction of the court, against one defendant, and in favor of another defendant, for costs, after a trial before the court and a jury. Affirmed.

Willett & Oleson, for appellant.

Hathaway & Alston, for respondents.

¹Reported in 131 Pac. 204.

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Opinion Per Gose, J.

Gose, J.—This action was originally commenced against the defendant corporation T. H. Williams Company, to recover an alleged balance due for services performed for it at its instance and request. It answered, denying that the plaintiff had performed any service for it. Thereupon the plaintiff amended his complaint, and alleged that the services were performed for both defendants. A joint demurrer to the complaint was overruled. The defendant Snoqualmie Lumber & Shingle Company failing to plead further, an order of default was entered against it. Two causes of action are pleaded. In the first cause of action it is alleged that the plaintiff performed labor for the defendants from the 1st day of January, 1910, to the 1st day of July following, at an agreed wage of \$80 per month. In the second cause of action the allegation is that the plaintiff performed labor for the defendants from the 1st day of July, 1910, to the 1st day of March, 1911, at an agreed wage of \$65 per month. The defendant T. H. Williams Company, in a separate answer, denied these averments. At the close of the trial, the court sustained the challenge of the defendant T. H. Williams Company to the sufficiency of the evidence, and directed a verdict against the defendant Snoqualmie Lumber & Shingle Company. Thereafter a judgment was entered in favor of the plaintiff against the latter company for the amount claimed, and in favor of the defendant Williams Company for its costs. The plaintiff has appealed from the judgment in favor of Williams Company.

The appellant contends that he was employed by, and worked for, the respondent T. H. Williams Company, whilst it contends that he was employed and worked for its codefendant. The single question presented is whether there was any substantial evidence to support the appellant's contention, and which should have been submitted to the jury. The evidence is, that the defendants are separate and distinct corporations; that they conducted separate businesses and kept separate bank accounts; that the Williams Company had its

mill at Snohomish; that its codefendant has its mill at Snoqualmie; that the defendants had common officers and a common office; that the Snoqualmie Lumber & Shingle Company has a capital stock of \$25,000; that it had a stockholder who owned \$5,000 of its stock who was not a stockholder in the other corporation; that the secretary of the two corporations owned \$5,000 of the stock of the Snoqualmie Lumber & Shingle Company, and nominally held one share of stock in the Williams Company to qualify him as a trustee. The appellant testified that he was employed by, and worked for, the Williams Company. He admitted, however, that from September, 1909, to July 1, 1910, he served as a foreman and kept the time of the men in the time book of the Snoqualmie Company upon which the words "Snoqualmie Lumber & Shingle Company" were written in large letters; that he gave the men their time checks upon which they were paid for their services; that he bought supplies, and that the accounts were made out to the Snoqualmie Company, and that he, in common with the others, was paid in checks signed by the Snoqualmie Company, thus: "Snoqualmie Lumber & Shingle Company, Incorporated, by," and upon the end of which was printed the words "Snoqualmie Lumber & Shingle Company, Incorporated, Manufacturers of Washington Red Cedar Shingles, Snoqualmie, Washington." Following these admissions, the documents were put in evidence. His explanation is that he did not read the printed matter in the time book, bills, or checks. He can both read and write.

The conviction is irresistible that he knew that he was working for the Snoqualmie Company. Moreover, he worked for the Williams Company at Snohomish, after he left the Snoqualmie Company, from March 1, 1911, to September 5, 1911, and admits that he was paid by its checks for the later service. The declarations of the appellant that he worked for the Williams Company are rendered worthless by his admissions and the record evidence. The admitted facts, that

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he served as foreman for the Snoqualmie Company for a period of nine months, kept its time book, purchased supplies, issued time checks to the men, received the checks of the Snoqualmie Company for himself and his colaborers, upon all of which plainly appeared the name of the Snoqualmie Company, force the conclusion that he knew that he was employed by the Snoqualmie Company.

“When the motion is grounded upon the insufficiency of plaintiff’s proof, the question presented is whether there is any substantial evidence tending to establish the cause of action sued on. The rule supported by the great weight of authority and by reason is that it is only where the court must say that, as a matter of law, no recovery can be had under any reasonable view of the evidence, that a verdict for the defendant will be directed.” 38 Cyc. 1576, 1577, clause c.

The judgment is affirmed.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10801. Department Two. April 5, 1913.]

JACOB QUAST *et al.*, Respondents, v. DANIEL B. RUGGLES,
*Appellant.*¹

BILLS AND NOTES—NEGOTIABILITY—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 3392, subd. 4, providing that a note to be negotiable “must be payable to order or to bearer,” and Id., § 3401, providing that it need not follow the language of the act, but any terms are sufficient which clearly indicate an intent to conform to the requirements thereof, a mortgage note simply made payable to B. (the mortgagee) without the words “order or bearer” or words of similar import, is not negotiable; notwithstanding provisions in certain contingencies respecting the mortgagee or his “assigns;” since these relate to the mortgage and indicate only that the mortgage may be transferred by assignment.

Appeal from a judgment of the superior court for Lincoln county, Baske, J., entered March 21, 1912, upon findings in

¹Reported in 131 Pac. 202.

favor of the plaintiffs, after a trial on the merits before the court, in an action for cancellation. Affirmed.

Tolman & King, for appellant.

W. W. Zent, for respondents.

MORRIS, J.—The question presented by this appeal is the negotiability of the following note:

“On the first of November, 1920, for value received, we promise to pay to M. L. Bevis the principal sum of \$1,200 (Twelve Hundred Dollars), with interest thereon at the rate of seven per cent per year, from the date hereof until maturity, payable annually according to the tenor of nine interest notes, each for \$84 and one (1) for \$80.97, bearing even date herewith; both principal and interest notes payable at the office of Bevis Bros., Spokane, Wash. (with exchange on New York). And if default be made in payment of any of said notes so secured, or any part of them, as the same mature, for the space of thirty days, or if the maker of this note and interest notes attached hereto shall allow the taxes or any other public rates and assessments on the property, or any part thereof, given as security for the aforesaid notes to become delinquent, or in case any taxes or assessments shall be levied against the holder of this note on account of this note, or shall do any act whereby the value of said mortgaged property shall be impaired, then, upon the happening of any of said contingencies, the whole amount herein secured shall at once become due and payable, and the mortgagee, his legal representatives or assigns may proceed at once to collect this note and foreclose the mortgage given to secure said note and sell the mortgaged property, or so much thereof as shall be necessary to satisfy said debt, interests and costs and all taxes, public rates, or assessments that may be due thereon, together with a reasonable attorney's fee, if suit be commenced for the purpose of collecting this debt or foreclosing the mortgage, securing said debt, and also said taxes, public rates, and assessments, and costs incurred by the mortgagee, his representatives or assigns, shall be secured by mortgage, and also in judgment in such foreclosure case. It is expressly agreed and declared that these notes are made and executed under and are in all re-

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spects to be construed by the laws of the state of Washington, and are secured by mortgage of even date herewith, duly recorded in Lincoln county of the state of Washington. This note bears interest at the rate of ten per cent per year, payable yearly after maturity. The makers of this note have the option of paying it any time the interest matures on and after November 1st, 1910. Dated at Spokane, state of Washington, on the 14th day of November, 1910.

“Jacob Quast, Jr.”

“Tena Quast.”

The sections of the negotiable instrument law controlling are § 3392, Rem. & Bal. Code, providing that an instrument to be negotiable “(4) must be payable to order or to bearer,” and § 3401, “The instrument need not follow the language of the act but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.” The instrument clearly is not payable “to order or to bearer,” and must for this reason be held nonnegotiable, unless we can find in it some language that, under § 3401, “clearly indicates an intention” to make it so payable.

Appellant contends this language is supplied in the provision accelerating the time of payment on the happening of certain contingencies, and providing in such case “the mortgagee, his legal representatives or assigns, may proceed at once to collect,” and the subsequent provision as to payment of taxes and costs by “his representatives or assigns.” The mortgage also refers to “party of the second part, his successors or assigns.” The word “assigns” as used in the note and mortgage does not refer to the payee of the note, but to the mortgagee, and indicates nothing more than that the mortgage may be transferred by assignment. The transfer of an instrument by assignment is not the equivalent of its transfer by indorsement. As interpreting § 3392, the provisions of § 3401 clearly refer to words of indorsement and not to words of assignment, and mean that, in order to make the instrument conform to the requirement of § 3392, it is not necessary to use the words “order or bearer,” but other

apt words showing a clear intent to make the instrument so payable will be sufficient. This is the general rule adopted by all courts in construing this requirement of the negotiable instrument law. *Zander v. New York Security & Trust Co.*, 89 Misc. 98, 78 N. Y. Supp. 900, affirmed on appeal in 81 App. Div. 635, 81 N. Y. Supp. 1151. The promise to pay in this case was to "Caroline Zander or her assigns," a stronger expression of intent than the one found in the note before us. The court, however, seemed to consider the matter so plain that the mere statement of its ruling was deemed sufficient, and the appellate court with like certainty did not regard the question as open to discussion, but affirmed on opinion of court below. Other supporting cases, all referring to the necessity of the use of the words "order or bearer" or words of like import, are: *Fulton v. Varney*, 117 App. Div. 572, 102 N. Y. Supp. 608; *Wettlaufer v. Baxter*, 137 Ky. 632, 125 S. W. 741, 26 L. R. A. (N. S.) 804; *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424; *Westberg v. Chicago Lumber & Coal Co.*, 117 Wis. 589, 94 N. W. 572. Other questions are discussed in the briefs, but finding our ruling upon the first point decisive of the appeal, we will not refer to them.

Judgment affirmed.

CROW, C. J., MAIN, FULLERTON, and ELLIS, JJ., concur.

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[No. 10858. Department One. April 7, 1913.]

SCHEUERMAN INVESTMENT COMPANY, *Respondent*, v. LAND OWNERS CORPORATION, *Appellant*.¹

BOUNDARIES—ESTABLISHMENT—DESCRIPTION IN DEEDS—EVIDENCE—SUFFICIENCY. Where a grantee in a deed platted the land and actually surveyed and staked the addition upon the ground conforming substantially to the description in his deed, such description must be taken as fixing the boundaries of the tract, notwithstanding that there appears of record a subsequent deed, between the same parties, purporting to be given to correct the description in the first deed, and fixing the west boundary of the tract thirty-five feet east of the boundary first fixed and platted on the ground, where it does not appear that the grantee ever accepted the second deed or caused it to be recorded and had no remembrance of it; nor is such conclusion overcome by the fact that the description in the paper plat conformed more nearly to the description in the second deed than to that in the first deed, the plat omitting reference to a granite monument controlling the description in the deeds.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 12, 1912, in favor of the plaintiff, after a trial on the merits before the court, in an action to establish a boundary line. Affirmed.

Preston & Thorgrimson, for appellant.

James Kiefer, for respondent.

PARKER, J.—The object of this action is to settle a land boundary dispute. On April 9, 1890, Christian Scheuerman, who was then the owner of the adjoining tracts of land now owned by the parties to this action, conveyed by deed to Albert M. Brooks a tract of land, the south and westerly boundaries of which were described therein as follows:

“Commencing at the quarter section post between section ten (10) and fifteen (15), township twenty-five (25), north range three (3) east, W. M. and running thence due north, variation twenty-two (22) degrees and forty (40) minutes east, twenty-three hundred and fifty-five and fifty-five hun-

¹Reported in 131 Pac. 216.

dredths (2355 & 55-100) feet to a granite monument [this being the beginning point on the south boundary of the land conveyed]; thence west four hundred (400) feet; thence in a northerly direction, making an angle of ninety-four (94) degrees and sixteen (16) minutes with the first course thirteen hundred and ninety-three (1393) feet to the shore of Puget Sound; . . .”

This deed appears to have been recorded at the request of Brooks, the grantee, in the auditor's office of King county on April 11, 1890. On May 13, 1890, there was signed and acknowledged another deed by Scheuerman, purporting to convey to Brooks land the south and westerly boundaries of which were described as in the deed of April 9, 1890, except the call west from the granite monument was stated therein as 364.53 feet, the difference in the description of the two deeds being a strip of land 35.47 feet wide lying along the westerly boundary, which strip of land is approximately the land here in controversy. Of this deed Brooks has no remembrance and no idea why it was executed. It appears to have been recorded on May 26, 1890, at the request of one Wheeler. There is, however, nothing in the record showing that Wheeler caused it to be recorded at the instance of Brooks, and we have no further information pointing to the fact that Brooks ever voluntarily received this deed. It purports upon its face to have been executed for the purpose of correcting the description in the deed of April 9, 1890, and recites as follows:

“This instrument is made to correct the description in a certain deed, bearing date the ninth day of April, 1890, made by Christian Scheuerman to Albert M. Brooks and which deed is recorded in volume 97 of deeds, on page 227 of deed records in the auditor's office in King county, state of Washington.”

In March, 1891, Brooks caused Bay Terrace addition to the city of Seattle to be surveyed and staked upon the ground, and a plat thereof in usual form to be recorded in the auditor's office of King county. This survey and plat

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covers a large part of the land described in the deeds above mentioned, and it was the evident intent of Brooks to thus survey and plat the land clear up to his westerly boundary. The initial point of the plat as designated thereon is the southwest corner of the southwesterly block thereof, "which is 363.8 feet west of, and 2,385 feet north of, the quarter section corner" mentioned as the beginning point in the description in the deeds. The granite monument is not mentioned upon the recorded plat. The westerly boundary of the plat is six feet to the west of this initial point. As this addition was actually surveyed and staked upon the ground, its westerly boundary conforms substantially to the description in the first deed to Brooks, though according to the designation of the initial point on the paper plat as recorded, the plat may seem to more nearly conform to the description in the second deed to Brooks. It is to be noticed, however, that the granite monument does not control the location of this westerly boundary of the plat. Plaintiff's land consists of a number of lots in the westerly tier of blocks of the plat, the westerly line of the lots being within six feet of the westerly line of the plat, the alley of that width being between. The plaintiff holds these lots by mesne conveyances from Brooks. In July, 1898, Christian Scheuerman executed and delivered to Lizette Backus a deed for a tract of land, the easterly boundary of which is therein described as "Commencing at the southwest corner of Bay Terrace addition to Seattle, recorded in the office of the county auditor of King county, state of Washington in volume seven (7) of plats, on page 61, running north $4^{\circ} 16''$ west thirteen hundred and ninety three (1,393) feet more or less, along the line of said Bay Terrace tract, to high water mark on Puget Sound." Defendant holds this tract of land by mesne conveyances from Lizette Backus. We do not find anything in the record warranting the conclusion that the land in dispute is in the physical possession of any one. These, in substance, are the material facts, as we view them, from which the respective

rights of the parties are to be determined. From a decree in favor of the plaintiff, adjudging the true easterly line of the defendant's land to be the westerly line of Bay Terrace addition as it was surveyed and staked upon the ground, the defendant has appealed.

The claims of appellant rest almost wholly upon the force and effect to be given to the second deed from Scheuerman to Brooks, purporting to be a deed of correction of the description in the first deed. It seems to us that the facts above summarized leave little to be said touching the correctness of the learned trial court's disposition of the case. It seems that Brooks claimed title under the first deed to him, in conformity with which he platted the addition and caused it to be surveyed and staked upon the ground. The purported deed of correction is not shown to have been executed under such circumstances as warrant the conclusion that Brooks was thereby divested of title to the strip lying between the westerly boundaries of the descriptions in the deeds, and which he clearly acquired by the first deed. We are also of the opinion that the seemingly nearer conformity of the recorded plat with the description of the purported correction deed does not warrant the view that Brooks thereby adopted that deed as a correction deed. We have noticed that the plat is not controlled by the granite monument, and it may be that a survey north and west from the quarter section corner, ignoring the granite monument, as was done in the original survey and location of the addition upon the ground, would locate the southwest corner of the addition four hundred feet west of the granite monument, as called for in the first deed to Brooks under which he evidently claimed title. This record lends fully as much support to the view that such a location of that corner is in conformity with the description in the first deed, as to the view that the granite monument is in fact located due north of the quarter corner. We conclude that the westerly boundary of Bay Terrace addition is as orig-

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inally surveyed and staked upon the ground, and that it is also the easterly boundary of appellant's land.

The judgment is affirmed.

Crow, C. J., Mount, Chadwick, and Gose, JJ., concur.

[No. 10887. Department Two. April 7, 1913.]

In re LEARY AVENUE, SEATTLE.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—INITIATING ORDINANCE—AMENDMENT—VESTED RIGHTS. Property owners have no such vested interest in the proceedings initiating a public improvement that the city could not amend the initiatory ordinance prescribing the special assessment district, so as to provide that the district shall be determined by the eminent domain commissioners, according to law, where there is no statute giving the property owners the right to protest against such improvement or to be represented by counsel in the initiatory condemnation proceedings, and the ordinance was amended prior to the notice of the assessment required by law to be given the property owners, who are then given an opportunity to make any objection to the assessment roll.

SAME — PRELIMINARY ORDINANCE—AMENDMENT — VALIDITY. An amendment of a specified section of an ordinance initiating a public improvement is not invalid by reason of the fact that such section had been previously repealed, where there was no doubt of its purpose to make the amendment a part of the original law; since an ordinance may be amended by adding a new section, which was the effect of the amendment.

Cross-appeals from a judgment of the superior court for King county, Mackintosh, J., entered October 14, 1912, setting aside an assessment roll for a local improvement, after a hearing before the court. Reversed.

James E. Bradford, C. B. White, and M. S. Good, for appellant.

T. F. Bevington, for respondents and cross-appellants.

Farrell, Kane & Stratton, for respondent Burke & Farrar.

Kerr & McCord, for respondent Seattle-Ballard Land Company.

¹Reported in 131 Pac. 225.

FULLERTON, J.—In June, 1909, the city council of the city of Seattle, by Ordinance No. 21,303, duly enacted and approved, provided for the establishment of a public street and highway to be known as Leary avenue. The highway as laid out began in the northerly part of the city and extended in a southeasterly direction to a connection with certain other principal highways theretofore established by the city, the purpose of the highway being to furnish the residents of the part of the city through which it extended a more direct route on better grades to and from the business center of the city than the existing streets afforded them. The ordinance prescribed the width of the proposed street, and established the grades thereon. As laid out, the street extended in part along and across existing streets and highways, some of which were required to be widened and the established grades thereon to be changed to make them conform to the requirements of the new street and extended in part across lands in private ownership which had theretofore been laid out and platted into lots and blocks. The ordinance also directed that condemnation proceedings be begun to acquire the necessary right of way, and to ascertain the amount of damages the construction of the highway would entail upon holders of property taken and damaged by its construction. Proceedings for that purpose were thereafter begun and prosecuted to a conclusion by the corporation counsel, terminating in judgments in favor of such property holders totaling \$351,000, the judgments being entered on January 17, 1911.

Section 5 of the ordinance provided:

“That the improvement provided for in this ordinance be paid for by special assessment upon property specially benefited, included in the following described district: [describing it.] Any part of the costs of said improvement that is not finally assessed against the property included in the above described district shall be paid from the general fund of the city of Seattle.”

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On February 10, 1911, the city council passed Ordinance No. 26,450 repealing § 5 above quoted. On April 6, 1911, it passed Ordinance No. 26,898 repealing Ordinance No. 26,450, the repealing ordinance. On May 22, 1911, it passed an ordinance amending § 5 of the original ordinance (No. 21,303) by making the same read as follows:

“Sec. 5. That the improvement provided for in this ordinance be paid for by special assessment upon property specially benefited in the manner provided by law. Any part of the costs of said improvement that is not finally assessed against the property specially benefited shall be paid from the general fund of the city of Seattle.”

Subsequent to the passage of these ordinances, the city caused to be filed in the condemnation proceedings its supplementary petition, praying the court that an assessment be made for the purpose of raising the amount necessary to pay the compensation and damages awarded in that proceeding; praying further that the matter be referred to the eminent domain commission of the city of Seattle with instructions to make such assessment “in the manner provided by law.” The court granted the petition, and thereafter the commission made an assessment upon the property they deemed to be specially benefited by the proposed improvement and returned their assessment into court in the form of an assessment roll. In making the assessment the commission found a much greater area of territory to be specially benefited by the improvement than that which was included in the district described in § 5 of the initiatory ordinance (No. 21,303), and assessed a considerable portion of the sum of money necessary to be raised on property lying outside the boundaries of such district.

On the return of the roll, a time was fixed for a hearing thereon, at which a number of persons whose property was affected by the assessment appeared and protested against the same, some of whom owned property outside of the district described in the initiatory ordinance, and some of

whom owned property within such district. After a hearing on the protests, the court sustained the same as to all persons owning property lying outside of the district described in the initiatory ordinance, and overruled it as to those owning property inside of such district, setting the assessment made by the commission aside, and directing that a new assessment be made in which the whole of the amount awarded in the condemnation proceeding, after deducting therefrom such proportion, if any, that the commission should find to be a benefit to the city generally, be assessed upon the district described in the initiatory ordinance. The city appeals from the whole of the order, and the property owners inside of the original district appeal from that part of the order directing a further assessment to be made.

The statutes applicable to the questions suggested by the appeals are found in Rem. & Bal. Code, §§ 7769, 7785, and 7790. These sections read in part as follows:

“Sec. 7769. When the corporate authorities of any such city shall desire to condemn land or other property, or damage the same, for any purpose authorized by this act, such city shall provide therefor by ordinance, and unless such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, compensation therefor shall be made from any general funds of such city applicable thereto. If such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, the proceedings for the making of such special assessment shall be as hereinafter prescribed, in this act.”

“Sec. 7785. When the ordinance under which said improvement is ordered to be made shall not provide that such improvement shall be made wholly by special assessment upon property benefited, the whole amount of such damage and costs, or such part thereof as shall not be assessed upon property benefited shall be paid from the general fund of such city or town, and if sufficient funds therefor are not already provided, such city or town shall levy and collect a sufficient sum therefor as part of the general taxes of such

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city or town, or may contract indebtedness by the issuance of bonds or warrants therefor as in other cases of internal improvements."

"Sec. 7790. It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made and the property which will be especially benefited thereby, and to estimate what proportion, if any, of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be a benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion, and having found said amounts, to apportion and assess the amount so found to be a benefit to the property upon the several lots, blocks, tracts and parcels of land, or other property in the proportion in which they will be severally benefited by such improvement: Provided, that the legislative body of the city may in the ordinance initiating any such improvement establish an assessment district and said district when so established shall be deemed to include all the lands or other property especially benefited by the proposed improvement, and the limits of said district when so fixed shall be binding and conclusive on the said commissioners: And provided further, that no property shall be assessed a greater amount than it will be actually benefited."

It seems to have been the opinion of the court below, and it is contended by the respondents in this court, that a municipality desiring to establish and improve a street must, in the ordinance initiating the proceedings, determine the manner in which it will provide the fund necessary to meet the cost and expense of the same; and if it determines in such ordinance that the whole or some part of such fund shall be raised by special assessment upon property benefited, it must provide in such ordinance whether it will leave the determination of the district to be assessed to the eminent domain commission provided by law to make the assessment or fix such district in the ordinance itself, and when it does so provide, no subsequent changes therein can be made which will affect the property interests of the individual. In sup-

port of these contentions, it is argued in the briefs that a property holder whose property is proposed to be assessed has an absolute right to appear before the body having authority to initiate the improvement and protest against the same, and to appear by counsel in the condemnation proceedings and be heard as to the justness of the claims of persons whose property is taken or damaged by the construction of the improvement, and "especially to object to and resist the entry of any agreed verdicts, which" are commonly entered in such causes.

We have not, however, been able to agree with the ruling of the trial court or with the contentions of the respondents. It is conceded by all authority that ordinances providing for public improvements may be amended so long as vested rights of individuals are not adversely affected thereby. This rule is self-evident, and follows from the very power the city has to enact ordinances. If, therefore, there were no vested rights affected by the amendment in this instance, and the amendment is sufficient in itself, there can be no valid objection to the amendment. The question then is, Did the amendment affect a vested right? It seems to us that it cannot be so held because of either of the reasons suggested by the respondents which we have mentioned. While property owners whose property is liable to be assessed for a contemplated improvement may have a natural right to peaceably assemble and protest against making the improvement, they have no absolute right to have their protest granted, or absolute right to maintain an action or proceeding in the courts based on the right if their protest is not granted. Rights of this character must be based upon some positive law or statute especially conferring the right, as it does not exist as part of the inherent law of the land. That there is no such law or statute is conceded; hence, it must follow, we think, that no vested right is denied by the failure to give property holders whose property is liable to be assessed to pay the cost of a contemplated improvement an

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opportunity to protest against such improvement. Nor does a property holder whose property is liable to be assessed for a public improvement have a legal right to appear by counsel in the trial of the condemnation cases against the persons whose property will be taken and damaged by the making of the improvement. The duty of conducting these proceedings is devolved by statute upon the city, and since it has the responsibility of properly conducting the proceedings, it must follow that it, and it alone, has the lawful right to appear in such proceedings, or to be represented therein by counsel.

Nor do we perceive any valid reason which supports the contention. The city must, of course, initiate and carry on a public improvement in the manner prescribed by the laws governing the procedure, and it is an admittedly essential element of a valid assessment that the owners of property on which an assessment is proposed to be levied have notice of the assessment and an opportunity to be heard as to its validity and amount before it becomes a fixed charge upon their lands. But these mark the extent of their absolute rights, and since there is no statute or charter provision of the city forbidding the amendments of ordinances in the particular here attempted, it cannot be claimed, of course, that the amendment is in violation of the positive law governing the procedure; and since the amendment preceded the assessment and the notice to the property holders, it is equally plain that they are precisely in the same situation that they would have been in had the district described in the initiatory ordinance included all of the lands that are included in the roll returned by the board of eminent domain commission. They can make every objection against the assessment roll now they could have then made, and this being so, it is manifest, we think, that no vested right of the property holder has been invaded by the amendment of the ordinance.

The principal cases cited as sustaining the respondents' contention are *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26; *Cincinnati v. Seasongood*, 46 Ohio St. 296, 21 N. E. 630, and *Houston v. McKenna*, 22 Cal. 550. The case from this court announces the rule that the city could not change its method of assessment from a "plan according to valuation to the later one of per front foot" if such change in method caused the particular property holder to pay a greater sum than he would have been called on to pay under the valuation scheme, but that "otherwise they have no right to complain." The case from Ohio seems to be rested on the principle that the city was required by the law governing the procedure to determine in the initiatory ordinance under which of three several methods of making the assessment it would pursue, and that it was not permissible to thereafter change the procedure. The case from California was rested on an entirely different principle, namely, the inviolability of contracts.

It has not seemed to us that either of these cases announces a rule contrary to the rule necessary to be followed in order to uphold the assessment before us, although the reasoning on which the Ohio case is rested may seem to be so contrary. But that this court did not intend in the case of *Spokane v. Browne*, *supra*, to hold that the property holder whose property is liable to be assessed had a vested interest in the proceedings initiating a public improvement is evidenced by the later cases of *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364, and *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367, and the cases following these decisions. In the first of these cases we sustained the constitutionality of the statute of 1893, which provided for a reassessment for local improvements where for any cause the original assessment is annulled, set aside, or declared void by the judgment of a court; saying in the course of the opinion, that it was within the power of the legislature to provide "for a reassessment in all cases where the assessment had been held

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to be void, whether for irregularities or for want of prerequisites which went to the jurisdiction of the council to levy the assessment and to order the work done." In the second case, we reaffirmed the first decision, and held further that the reassessment could be made on property benefited although not included in the original district attempted to be assessed. This latter principle was again affirmed in *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 231, 55 Pac. 630. The rule announced in these cases is clearly contrary to the idea that the property owner has a vested interest in the proceedings initiating a public improvement, or with the idea that an assessment district once established cannot be changed no matter how erroneous or inequitable it may be; for surely, if it is within the power of the legislature to call upon property benefited by a public improvement to pay the costs of making the same, by a proceeding initiated after the improvement has been completed under an entirely invalid proceeding, it cannot be that vested rights are conferred upon the owners of the property assessed by the proceedings initiating the improvement.

Other cases cited from this court and quoted from at length as sustaining the judgment of the trial court, are *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; and *State ex rel. Barber Asphalt Pav. Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11. But without reviewing them at length, we think they contain nothing that militates against the rule we here announce. All that they contain pertinent to the case in hand is, that a city in making a street improvement, if it is to charge the cost to the property benefited, must substantially comply with the provisions of the law empowering it to make the improvement—a principle to which we may subscribe, we think, without holding invalid the proceedings followed by the city in the present instance.

It is further urged that there was no valid amendment of the statute, and hence any assessment attempted to be made

thereunder is invalid. The precise contention is this: the first repealing ordinance, which repealed § 5 of the initiatory ordinance, eliminated therefrom the section providing that the improvement should be paid for by special assessment on property benefited, which by the provision of the statute above quoted relegated the cost to the general fund of the city; that the second repealing ordinance, which repealed the first repealing ordinance, did not have the effect of reviving § 5 of the initiatory ordinance, so that the ordinance then stood as if originally enacted without § 5, and that in consequence the last ordinance, which purported to amend § 5 of the initiatory ordinance, was invalid for the reason that there was no § 5 in the initiatory ordinance upon which the amendment could operate. But we have not been able to agree with the contention. An ordinance can be amended by adding thereto an additional section as well as by amending an existing one, and we think that this is what the amendment here questioned does in effect. The references to the ordinance amended are merely for the purposes of identification, and if these references taken as a whole make clear the purposes of the amendment it is sufficient, even though in part they may be inaccurate or even misleading. There is no difficulty on this score with the present amendment. It sets forth the title of the original ordinance and recites that § 5 thereof is amended to read in a particular manner. And notwithstanding we find on examining prior ordinances that the § 5 which is purported to be amended has been repealed, we know that the purpose of the law-making body was to make this particular amendment a part of the original ordinance. There being no doubt as to its purpose, the courts are obligated to give it effect. It has been frequently held that a statute unconstitutional because containing objectionable provisions in a particular section may be made constitutional by an amendment removing the objectionable provisions. *State ex rel. v. Cincinnati*, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; *Allison v. Corker*, 67 N. J. L.

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596, 52 Atl. 362, 60 L. R. A. 564; *Ferry v. Campbell*, 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774. These cases are analogous to the case at bar. An unconstitutional section in an act is as much invalid as is a section that has been formally repealed, and if the one may be amended, it is difficult to conceive a reason that would deny the right of amendment to the other. We think therefore that the amendment is valid, and that the provisions of the ordinance as amended must be pursued in making the assessment to meet the costs of the improvement.

We have not noticed specially the contentions of the appellants other than the city. Their objections are determined, however, by what is said concerning the amendment to the initiatory ordinance, and require no further consideration.

The judgment appealed from is reversed, and the cause remanded with instructions to reinstate the roll returned by the eminent domain commission and proceed with a hearing thereon, after notice, in the manner required by law.

CROW, C. J., MAIN, ELLIS, and MORRIS, JJ., concur.

[No. 10640. Department One. April 8, 1913.]

ALPHA CORMAN, *Respondent*, v. THOMAS SANDERSON *et al.*,
Appellants.¹

LANDLORD AND TENANT—UNLAWFUL DETAINER—ACTION ON BOND—DEFENSES—SURRENDER. The defendant in an action of unlawful detainer did not voluntarily surrender the premises, so as to preclude action on the bond for restitution, where she failed to have entered an order increasing the plaintiff's bond, after the court had granted a motion therefor, and the plaintiff took advantage of the situation, stood upon the bond already given, and directed execution of the writ, whereupon the defendant moved out under the threat that her goods would be thrown into the street.

¹Reported in 131 Pac. 198.

SAME—UNLAWFUL DETAINER—ACTION ON BOND—PRIMA FACIE CASE. In an action upon a bond for restitution given in an unlawful detainer action, the fact that the plaintiff in unlawful detainer voluntarily dismissed his action is *prima facie* sufficient to show that the writ was wrongfully sued out; and authorizes a recovery where it was further shown that plaintiff was in possession under a lease from one authorized to make it.

SAME—LIABILITY ON BOND—ELEMENTS OF DAMAGE. In an action upon a bond for restitution, given in an unlawful detainer action in which the tenant was ousted of possession, the plaintiff may recover as elements of damage the amount of advance rents paid, damages on account of the removal, and attorney's fees paid for successfully defending the unlawful detainer action.

Appeal from a judgment of the superior court for King county, Main J., entered April 6, 1912, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a bond. Affirmed.

Howard Waterman, for appellants.

Brady & Rummens, for respondent.

MOUNT, J.—This action was brought to recover upon a bond given by the defendants in an action for unlawful detainer. The plaintiff recovered a judgment, and the defendants have appealed.

The facts are as follows: In September, 1909, the plaintiff was in possession of a house and lot under a lease which was of record and which expired by its terms on May 31, 1910. She had made a deposit of \$250 under the terms of her lease, which was to be applied upon the rent for the last six months, the rental for that time being \$45 per month. The defendant Sanderson acquired the property while plaintiff was in possession. On November 2, 1909, he began an action against the plaintiff wherein he alleged, that she was a tenant from month to month; that he had served notice upon her to quit the premises; that by reason thereof the tenancy had been terminated, and that she was unlawfully detaining the possession of the property, and prayed for a

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restitution thereof. Upon motion of the plaintiff in that action, the court entered an order for a writ of restitution upon the plaintiff's giving a bond to defendant therein in the sum of \$500. The bond was given, with the defendants Keating and Ostrom in this action as sureties upon the bond. This bond provided that "said plaintiff shall prosecute his action without delay, and pay all costs that may be adjudged to defendant therein, and all damages which she may sustain by reason of said writ of restitution having been issued should the same be wrongfully sued out." The writ was thereupon issued and served by the sheriff of King county upon the defendant in that action, on November 4, 1909.

A day or two later, the defendant in that action filed a motion to have the penalty in the bond increased. Upon a hearing of that motion it was granted, but the order was not entered, and the plaintiff therein did not give a new bond, but afterwards notified the defendant in that action that, unless she moved out, her goods would be thrown into the street. Thereafter, in accordance with the writ and these threats, she moved out of the premises. She thereafter filed an answer in the cause and issues were joined. In April, 1911, the case came on for trial to the court with a jury. After evidence was heard, the plaintiff in that action took a voluntary nonsuit and dismissed the action. At that time the defendant's lease had expired, and she was not restored to the possession of the premises. She had been kept out of the use of the premises by reason of said writ of restitution. She thereupon brought this action to recover upon the bond, with the results stated above.

It is argued by the appellants that, after the court had sustained a motion for an increase of the penalty of the bond for the writ of restitution, the writ, though previously served, became ineffective, and that when the plaintiff in this action moved out after service of the writ and surrendered possession of the premises, she did so voluntarily, and therefore is not entitled to recover upon the bond. This posi-

tion would probably be sound if the order increasing the bond had been entered, and the appellants in this action had not stood upon the bond already given and thereafter notified the respondent in this action that, if she did not move out, her goods would be thrown into the street. In other words, the plaintiff in this action, being the defendant in the former action and the moving party therein, did not have the order entered. The plaintiffs in that action, being the defendants in this action, took advantage of that situation, and stood upon the bond already given and directed the execution of the writ. The respondent here waived her right to insist upon a new bond, and in obedience to the writ and the threat made by the appellants, moved out of the premises. We think this was not a voluntary surrender of the premises.

Appellants next argue that the court erred in allowing damages, because respondent did not prove any right to possession of the premises or any damages. The conceded fact that the plaintiff in the action in which the bond was given took a voluntary dismissal thereof at the trial of that action is *prima facie* sufficient to show that the writ was wrongfully sued out. But in addition to that fact, it was shown that the respondent had a lease of record from one authorized to make a lease, and that she was in possession holding under that lease. The appellants knew that fact at the time the writ was sued out. The evidence shows, and the court found, that the respondent had paid \$225 advance rent, and that she was damaged \$50 on account of the removal and \$100 for attorney's fees in successfully defending the unlawful detainer action. These were proper items to be allowed.

The judgment is therefore affirmed.

CROW, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

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Statement of Case.

[No. 10638. Department Two. April 8, 1913.]

SUMNER LUMBER & SHINGLE COMPANY, *Respondent*, v.PACIFIC COAST POWER COMPANY *et al.*, *Appellants*.¹

NAVIGABLE WATERS—NAVIGABLE OR FLOATABLE STREAMS—EVIDENCE—SUFFICIENCY. A stream that is navigable or floatable for shingle bolts only by artificial means, is not a public highway; and a stream is not navigable where it appears that drives required the assistance of men and teams in breaking up jams, opening new channels and keeping bolts from lodging, that no drives had been made without the use of the banks, and that few if any bolts could be brought down by natural means.

SAME—RIPARIAN RIGHTS—USE OF WATERS—INJUNCTION. The right to use a stream for floating logs is correlative with the right of a power company to use the water for power purposes, and as each right must be used with due regard to the other, an injunction against all use of the water cannot be sustained.

SAME—EVIDENCE—MEANDER. The fact that a stream is not meandered by the public survey does not establish its character as a navigable or nonnavigable stream.

WATERS AND WATER COURSES—RIPARIAN RIGHTS—FLOW AND USE. The use of the waters of a stream for power purposes in no way infringes upon the rights of one who has acquired the timber on riparian lands, where such use does not interfere to any extent with the flow of the water to which the land is entitled.

SAME. A lower riparian proprietor cannot insist that there be no diminution whatever of the natural flow of the stream, as each owner is entitled to a reasonable and proper use.

SAME—APPROPRIATION—PRIORITY. The rights of an appropriator of water for power purposes relate back to the first substantial act for the acquisition of the right if followed up with reasonable diligence, and are superior to the rights of an owner of land which subsequently became riparian by a change in the course of the stream.

NAVIGABLE WATERS—FLOATABILITY—EVIDENCE. The navigability of streams for floating shingle bolts is not determined by the size of the stream, but by their capacity for valuable public use in their natural condition.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 25, 1912, upon findings in

¹Reported in 131 Pac. 220.

favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enjoin a power company from diverting the waters of a river. Reversed.

James B. Howe and *John A. Shackleford*, for appellants.

E. N. Steele and *Troy & Sturdevant*, for respondent.

MORRIS, J.—The respondent company operates a shingle mill near the mouth of the Stuck river. In connection with its mill it maintains a boom, and has included in its boom plat filed with the secretary of state all of the Stuck river, and the White river from its union with the Stuck river up beyond Buckley. The Pacific Coast Power Company maintains a large electric power plant near Dieringer. To obtain water for generating this power, it has obtained, through the purchase of riparian lands or the acquirement of water rights, all of the riparian rights (except as to one small piece that will be hereafter referred to) upon the White and Stuck rivers between points near Buckley and Dieringer, a distance of approximately eighteen miles. At the point near Buckley, the power company has constructed a dam, and by flume and canal conveys the water from its intake to Lake Tapps, which is used as a reservoir for storage of the water for use at such times as the natural flow would prove insufficient for the purpose required. From Lake Tapps the water is conveyed to the power house, and thence through a tail race it finds its way into the Stuck river.

Prior to the incorporation of the power company, on January 17, 1908, the Tacoma Industrial Company and the White River Power Company had acquired water rights and lands along the White river, and as early as 1903 engineering and construction work had commenced by one or the other of these companies. At the time of appellant's incorporation, these other companies conveyed all their rights and property to it. Appellant then proceeded with the development of the power scheme and the construction of its power plant, and up to the time of trial, had expended in

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construction work about \$5,000,000, the plant being completed in October, 1911. The respondent was incorporated in July, 1908, and began the construction of its mill, which was completed and started operations in October, 1908. In August, 1910, the shingle company purchased the cedar upon a tract of land located some distance above the dam and intake of the power company, under which contract it was bound to remove the cedar within three years. This land is referred to in the record as the St. Paul land. In August, 1911, subsequent to the commencement of this action, the shingle company agreed to purchase from the Northern Pacific Railway forty acres of land on White river, between the dam and intake of the power company and the point where the water is returned to Stuck river. This land is referred to as the Northern Pacific land. When the power company acquired all the riparian rights on these rivers in 1908, this Northern Pacific land was not riparian to either river. Subsequently the White river changed its course, and as a result of such change, about two hundred and fifty feet of this Northern Pacific land now abuts on the river. This action was commenced by the shingle company to enjoin the power company from maintaining its dam and diverting the waters of White river at its intake, alleging that such diversion would destroy the two rivers as a water highway and prevent the shingle company from getting its timber or that of others to its mill, and destroy its business as a booming company. The court below granted such an injunction, and the power company has appealed.

The appeal presents only questions of law, all the material facts being conceded. In determining the respective rights of these parties to the rivers and the use of their waters, the first point to be decided is the character of these two rivers. They are practically one river and will be treated as such. Respondent company made its first drive in September, 1908, since which time it has made fourteen drives from points below appellant's intake and four drives from above

the intake. In order to make these drives, it has expended about \$700 in improving the river for driving purposes, in removing boulders and other obstructions, making new channels, and other like work. There is much testimony in the record as to whether it is possible to make a drive without the use of the banks, it being conceded, as we understand it, that such drives could not be made without using the bed of the stream; and while there is no dispute as to the fact that no drive has been made without the use of the banks, the lower court seemed impressed with the opinions of witnesses that it could be done, and found "that in driving shingle bolts down the said rivers to plaintiff's mill, drivers have been accustomed to frequently go upon the banks of the streams above the line of high water mark, but that it is not necessary so to do, although it is necessary in driving on the said streams for the drivers to go upon the bed of the streams." Whether or not a drive could be made without the use of the banks, we are unable to say. We think it is better to take the facts as they appear, rather than the opinions of witnesses given for the purposes of obtaining or defeating relief in litigation. It is clear, however, that it would be impossible to drive these rivers without men and teams assisting in breaking up jams, opening up new channels, and keeping the bolts from lodging on the banks and bars. We not only have the evidence of witnesses as to what was done, but through the medium of about two hundred pictures we have been able to get a fair view of the difficulties encountered and the obstacles overcome in making a drive. It is apparent that, if dependency was had upon the natural condition of these streams, few if any shingle bolts would ever reach respondent's mill. The river is a glacial stream, subject to material variation during each summer day on account of the glacial tide. A chart showing the flow is in the record. From this chart it appears that it is not an unusual thing for the flow to increase or diminish nearly one hundred per cent within a day or two. The result of this intermit-

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tent flow is that the bolts are lodged all over the bed of the river, which, on account of numerous past floods and erosions, averages nearly one hundred feet, and requires constant handling to keep them in the drive.

The navigability of streams, or that they possess a capacity for valuable floatage, is a question of fact, and he who asserts it must prove it. To be navigable or floatable in law the stream must possess such characteristic in its natural state. If artificial means or aids are necessary in making use of the stream to float timber, the stream is not floatable. This rule was first announced by this court in *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001, where it was said:

“It is well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway.”

The same rule was announced in *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. 821, 54 L. R. A. 178. In *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199, a new element of floatability was announced, in holding that streams which can, during annually recurring freshets, be used profitably for the floating of logs, must be held to be public highways for such purposes; that while in such streams the title to the beds might be in the riparian owner, such title was subject to an easement in the public to use the stream for floating logs and timber products; and while such use as a public highway could not be denied, the easement was confined to the stream, and neither the banks nor the soil in such a stream as the one then being considered could be used as an aid to floatability without the landowner's consent, or right obtained by operation of law. We next had occasion to rule on this same question in *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272, and, following *Watkins v. Dorris*, it was held that a stream which in its natural state is capable of floating shingle bolts, after heavy rains and during freshets

which occur with periodic regularity in the spring and fall of each year without the storage of water by dam, is a navigable stream for the purpose of floating shingle bolts and other timber products. As determining that such a rule was in this state one of necessity, it was there said:

“The reasons leading to the holding in this state and others, where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose, are founded upon commercial convenience and necessity, because of the environment of the industry. Much of the timber grows in the mountains, also upon the foothills, and in other localities which are inaccessible by means of transportation facilities, without great expense. Nature has, however, provided numerous streams which flow out from these timber centers, and which are available highways for the carriage of the timber to market. In a locality so situated, it seems reasonable that these highways should be used for such purposes. It is true, the majority of these streams, being unmeandered, pass over private property, and their beds are owned by the adjacent land owner. But the lands are naturally burdened, if it be a burden, by the streams themselves, with their defined banks and flowing water, and it is not an additional burden to the land owner for the timber product to float along with the already running water, provided it is so done as not to damage his land. His rights in the latter particular must, however, be strictly and carefully guarded. Under the former decisions of this court, and for the further reasons herein assigned, the court did not err in holding that Woods creek is a navigable stream for the floatage of shingle bolts;”

to which was added later on in the opinion:

“We believe we went as far as we should go in the interest of public convenience, when we held, in *Watkins v. Dorris*, *supra*, that private land owners hold the beds of unmeandered streams subject to the easement of driving timber products over the land. But we tried to make it clear in that case that the timber driver must confine himself and his operations to the highway itself—the bed of the stream—until the land owner consents to the use of the banks or

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until the right to their use has been acquired in a lawful manner. If more emphatic statement of that rule is necessary, we now wish to be understood as making it, with all needed emphasis. The fundamental principle of right in the land owner to control his own premises, outside of the bed of the stream, must not be violated."

The navigability of a stream that will float timber products during natural freshets was next determined in *State ex rel. United Tanners Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017, and the previous cases followed. It was, however, said in that case, that the fact that the use of the shores added to the convenience of driving the timber did not affect the question of the natural navigable capacity of the stream, quoting from *Olson v. Merrill*, 42 Wis. 203: "A stream is none the less navigable because persons using it are induced by convenience to prefer unlawful to lawful means in aid of the use." That it was not intended to depart from the rule of the prior cases is evident from what is next said: "Where the use of the shore rights is required to facilitate the driving of logs, they must be acquired by private treaty or by condemnation." Our latest statements of the rights as to the banks and beds of these small streams is found in *Berryman v. East Hoquiam Boom & Logging Co.*, 68 Wash. 657, 124 Pac. 130, where it was held that the right to damage riparian lands by splash dams could be acquired by prescription, but if not so acquired, "persons have no right to use or interfere with the beds or banks of a stream without the riparian owner's consent."

From these decisions it can be gathered that the present rule in this state is that a navigable or floatable stream is one that in its natural condition, without artificial means or aids, is susceptible of floating timber products from the forest to the mill, and that streams which are subject to annually occurring freshets of sufficient volume to float logs or shingle bolts are considered floatable in their natural condition, and that as between the riparian owner and the tim-

ber driver, the driver must confine himself to the stream itself, and cannot make use of the banks until the right to such use is obtained by grant, prescription, or eminent domain. That such is the rule in other states, where the law has been moulded to fit natural conditions and necessities as referred to in *Monroe Mill Co. v. Menzel*, *supra*, is apparent from the following cases: *Carlson v. St. Louis River Dam & Imp. Co.*, 73 Minn. 128, 75 N. W. 1044, 72 Am. St. 610, 41 L. R. A. 371, and note; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *Pearson v. Rolfe*, 76 Me. 380; where it is said:

“The log driver takes the waters as they run, and the bed over which they flow as nature provides. Nor has any person the right, unless upon his own land, or under legislative grant, to remove natural obstructions from the bed of a river in order to improve its navigation. . . . It is settled in this state that he [riparian owner] owns the bed of the river to the middle of the stream. He owns all the rocks and natural barriers in it. He owns all but the public right of passage. The right of passage does not include any right to meddle with the rocks or soil in the bed of the river.”

In *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 335, 18 Am. Rep. 184, in discussing the same relative rights, it is said the right of the public in a navigable or floatable stream is a right only to the stream “in its natural state and ordinary capacity,” and that these terms include periodical fluctuations in the volume and height of the water “recurring as regularly as the seasons,” and that “any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation.” In *Haines v. Hall*, 17 Ore. 165, 20 Pac. 831, 3 L. R. A. 609, we find a similar condition to that shown in this record. In order to drive the logs down the stream, men were employed and stationed along the bank with cant-hooks and other appliances to prevent the logs from lodging, and to roll them back into the stream, drag them over

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gravel bars, turn them around bends, break jams, etc. In dealing with this situation the court said:

"A stream that cannot be used without employing the means and appliances which the appellant made use of in order to float his logs down this one certainly ought not to be regarded as a public highway for any purpose."

In *Felger v. Robinson*, 3 Ore. 455, the court makes use of this language: "Any stream in which logs will go by the force of the water is navigable." *Kamm v. Normand*, 50 Ore. 9, 91 Pac. 448, 126 Am. St. 698, 11 L. R. A. (N. S.) 290, after reviewing numerous authorities, reaches the same conclusion.

Following the rule as established by these authorities, and many others examined but not cited, we reach the conclusion that this river, between the intake and tail race of the appellant, is not a navigable or floatable stream. If we should announce a different conclusion and hold that it was floatable, the right of respondent to make such use of it would not be superior to appellant's right as a riparian owner to use the water for power purposes. In such a case, the rights would be correlative, and each must use his right with due regard to the existence and protection of the other. *Middleton v. Flat River Boom Co.*, 27 Mich. 583; *Buchanan v. Grand River etc. L. R. Co.*, 48 Mich. 364, 12 N. W. 490; *White River Log & Boom Co. v. Nelson*, 45 Mich. 578, 8 N. W. 587, 909. So that, even under such a holding, we could not sustain the lower court in enjoining the appellant from its use of the water. Stuck river is not meandered, while the White river is meandered only upon the right bank. That a stream is not meandered does not of itself establish its character as a navigable or nonnavigable stream. It would indicate nothing more than that, in the opinion of the officers ordering or making the survey, the stream was not navigable. *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. 821, 54 L. R. A. 178; *Lonsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663.

Respondent contends that it has riparian rights under its ownership of the timber on the St. Paul land above the intake. It has, however, no ownership in these lands, having acquired only the right to remove the cedar timber therefrom. Appellant's use of the water in no way infringes upon any riparian right attaching to these lands, nor interferes to any extent with the flow of water to which the land itself is entitled by reason of its riparian situation. Neither does it appear to us that respondent's riparian rights below the tail race are in any way interfered with. It contends that appellant, as an upper riparian owner, has no right to disturb the flow of the river in any manner so as to increase or diminish the flow at any particular time, citing *Cooley on Torts*, 694; that it is an unreasonable detention of waters to gather it into reservoirs and discharge it occasionally in order to increase the natural flow. Referring to the language of the entire section from which this citation is taken, we find that, while it sets forth the general rule that each riparian owner is entitled to the steady flow of the stream according to its natural flow, it also adds that to apply this rule strictly would be to preclude the best use of flowing waters, and where power is desired the rule must yield to the necessity of gathering the water into reservoirs, and that such use is a proper and lawful use when made in good faith and for a useful purpose, with as little interference with the rights of other proprietors as is reasonably practicable under the circumstances, and that for this purpose it is not unreasonable nor unlawful to detain surplus water not used in the wet season and discharge it in proper quantities in the dry season. We have before referred to the fluctuations in the natural flow of these streams. We think it is established by this record that, while appellant was feeding its reservoir, there was an interference with the flow past respondent's riparian lands; that since the plant has been completed the flow of the water has been equalized below the tail race, and no interruptions to speak of have occurred. Neither do we think it

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is the law that there can be no diminution whatever to the natural flow of the stream to the lower owner, in the use made by the upper owner; such a rule would deny the upper owner any valuable use of the water. Each owner is entitled to a reasonable use, and any interruption in the flow, unavoidable by reasonable and proper use, is permissible. *McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851, 26 L. R. A. (N. S.) 222; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N. W. 167, 44 Am. Rep. 194.

The next question to be determined is whether the Northern Pacific land is entitled to riparian rights as against appellant. At the time appellant acquired its rights on the river, this forty-acre tract did not abut upon the river. The rights acquired by appellant included all riparian rights attaching to all lands abutting the river on either bank, between its intake and tail race. Subsequently the river changed its course, and, at the time of the trial, ran across one end of the forty for a distance of about 250 feet. Respondent contends that the rule applicable to gradual erosion on one bank and gradual accretion on the other should be applied. While that rule is well established, it does not seem to us that it is a proper one whereby to measure these water rights. Appellant, under the doctrine of relation, became possessed of the right to the use of the water in this river in January, 1908. Its rights as an appropriator then became fixed and established, and are superior to the rights of respondent as the owner of land becoming riparian subsequent to that appropriation. In states such as ours, where no notice of appropriation is required for taking water for power purposes, the right relates back to the first substantial act of the appropriator for the acquisition of the right, whether that act be the actual commencement of construction work or other necessary work incident thereto; provided always that reasonable diligence is exercised in finally perfecting the appropriation. Kinney,

Irrigation & Water Rights, § 747, where this rule is announced and the supporting cases cited.

Respondent attacks the diligence of appellant in proceeding with its work, but without referring to the evidence, which leads us to a different conclusion, we think it abundantly appears that, for a work of such magnitude, appellant proceeded with all proper diligence and that at no time from its first adoption of its plan to the final completion of the plant, so far as this record discloses, can it be said there is any act, or the lack of any act, on the part of appellant that would indicate any abandonment or desire to unnecessarily prolong its construction work. We therefore hold that appellant's rights as a prior appropriator are superior to the rights obtained by respondent by reason of the Northern Pacific land becoming riparian. There is no question submitted by this appeal as to the floatability of these rivers during annually recurring freshets. In fact, it is conceded that, if floatable at all, they are only so during the summer months, and that during the winter months, or other times when the streams are subject to freshets or high water, it is impracticable if not impossible to drive shingle bolts, as the current is so swift the bolts will, to use the expression of one witness, "duck" the boom and pass beyond it.

In citing other cases from our own state we should have referred to the case of *Kalama Elec. L. & P. Co. v. Kalama Driving Co.*, 48 Wash. 612, 94 Pac. 469, 125 Am. St. 948, 22 L. R. A. (N. S.) 641, which as here, was a contest between a power company, claiming the right to the use of the water as a riparian owner and prior appropriator, and a driving company claiming the right to create artificial freshets by means of splash dams upon which to drive logs during seasons when the natural flow of the stream was insufficient. That case differs from this in that it was there held that, because of the stream being floatable at times of natural recurring freshets, it was navigable. The driving company also had the right to construct dams and gather water for

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artificial flows. The rule announced was that the power company as a riparian owner and prior appropriator had the superior right to water for power purposes, and could enjoin the driving company from retarding the flow of the stream in order to gather the water in its dams for the purpose of creating artificial splashes. While the facts are not parallel, the principle upon which the decision rested—the superior rights of the riparian owner and prior appropriator—is valuable in determining the rights submitted by this appeal.

Counsel for respondent in his argument called attention to the fact that a number of streams in this state, smaller than White river, have been held floatable. This may be true. The floatability of rivers and streams is, however, not to be determined by their size, but by their capacity for valuable public use in their natural condition, irrespective of their size. The right to the use of the waters of these rivers for booming and driving purposes is sought by respondent, principally, if not entirely, for its own use in bringing shingle bolts to its mill. While it has the power under its incorporation to act in such capacity for the public, it never has done so, but has confined its operations to driving and booming shingle bolts intended for its own mill. These facts are worthy of mention only in suggesting that, in so far as the public use or benefit is affected, the use of the water of these rivers as desired by appellant serves a great public need, while that of respondent is in effect for its own private use.

The judgment is reversed, and the cause remanded with instructions to dismiss.

MOUNT, MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 10763. Department One. April 8, 1913.]

**J. H. TENNES, *Respondent*, v. AMERICAN BUILDING COMPANY,
Appellant.¹**

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—WAIVER. A constructive eviction by an unlawful interference with the lessee's subtenant is waived where the lessee does not surrender the premises.

SAME—LEASE—BREACH BY LANDLORD—DAMAGES—EVIDENCE—ADMISSIBILITY. Where a landlord unlawfully interfered with the lessee's subtenant, causing a loss of the rent under the sublease, the sublease is not admissible in evidence to prove the damages, inasmuch as gains or profits of collateral subcontracts cannot be recovered for breach of the original contract, where the subcontract was made after the execution of the original contract.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 10, 1912, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

Wakefield & Witherspoon (A. C. Shaw, of counsel), for appellant.

Belt & Powell, for respondent.

Gose, J.—This is an action to recover rent under a written lease. It is alleged in the complaint that, on or about November 1, 1909, the plaintiff, with one Burns, leased the first floor of a building, situate in the city of Spokane, to the Shubert Theater Company, a corporation, "for a theater entrance to the theater in the rear of said premises," for a term of five years from that date, at an agreed monthly rental of \$250 per month, payable in advance on the first day of each month; that thereafter the lessee assigned its lease to the defendant; that it accepted the lease, assumed the obligations thereof, and since the assignment up to and including July, 1911, paid the rent provided in the lease; that by agreement between the plaintiff and Burns, the rent became and is the property of

¹Reported in 131 Pac. 201.

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the plaintiff; that the defendant has not paid the rent for the months of August, September, October and November, 1911, and a judgment is demanded for the rent of those months, aggregating \$1,000.

The defendant answered, admitting the assignment of the lease to it, as alleged in the complaint; admitting that it went into possession of the premises and paid the rent up to July, 1911; and pleaded affirmatively that the lease provided that so much of the leased premises as might not be necessary for or devoted to a theater entrance might be used by the lessee for any lawful purpose; that, after the assignment, it changed and altered the building in accordance with the terms of the lease so as to make two storerooms, one on either side of the entrance to the theater; that thereafter and about the first day of December, 1910, the defendant leased one of the rooms to one Edward Dufresne at a rental of \$200 per month, to be used for a lawful purpose, but that the plaintiff refused to permit Dufresne to take possession of the room, sued out a writ of injunction restraining him from taking possession and restraining the defendant from leasing the room to him; and that ever since the plaintiff has refused to permit the defendant to lease the room to Dufresne, and it has remained vacant and unoccupied. It is further alleged that the clause in the lease providing that that portion of the building not needed for a theater entrance could be used by the lessee for any lawful purpose was one of the inducements which caused the Shubert Theater Company to make the lease; that, by reason of the action of the plaintiff, the obligation to pay the rent stipulated has ceased and terminated, "and that the only sum which this defendant should be required to pay is the sum stipulated in said lease, less the sum agreed to be paid by the said Dufresne" for the part leased to him.

In the reply the lease from the company to Dufresne is denied on information and belief, and it is denied that the Shubert Theater Company was induced to enter into the lease because of the provision therein that that part of the prem-

ises not needed for the theater entrance could be used for any lawful purpose. The averment that the defendant is released from its obligation to pay rent is also denied.

The case was tried to the court. The fact that the defendant had not paid the four months' rent was admitted. The defendant then offered in evidence the Dufresne lease and the record in the injunction proceeding, and offered proof tending to show that, at the time it made the lease to Dufresne and at the time of the issuing of the restraining order, Dufresne was solvent. The court found, that the lease was made and assigned as alleged in the complaint; that the plaintiff had succeeded to Burns' interest in the rent, and that the defendant had paid certain rent to the plaintiff. The court further found that, on or about the first day of December, 1910, the defendant leased to Dufresne a portion of the building for the term of three years and eleven months, he agreeing to pay therefor \$200 per month; that Dufresne was prevented from entering into the possession of the room by an injunction sued out by the plaintiff and Burns; that the defendant was at all times in the possession and control of the storeroom leased to Dufresne; that it failed to prove that it had been damaged except in a nominal sum by the eviction of Dufresne; that it was not entitled to offset or counterclaim any sum against the rent due the plaintiff except to the extent of one dollar nominal damages for the eviction; that the defendant used reasonable diligence to lease the storeroom leased to Dufresne from the time it was enjoined from subletting to Dufresne, but was unable to do so. A judgment was entered in favor of the plaintiff for the sum of \$999, the full amount of the rent in default, less one dollar allowed to the defendant as nominal damages. The defendant has appealed.

The appellant would have been justified in treating the injunction sued out as a constructive eviction. The rule is that "any intentional or injurious interference by the landlord or those acting under his authority, which deprives the tenant of the means or the power of beneficial enjoyment of the de-

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mised premises or any part thereof or materially impairs such beneficial enjoyment, is a constructive eviction." 1 Am. & Eng. Ency. Law (2d ed.), p. 471.

It chose, however, to remain in possession of the leased premises, and in so doing, it waived its right to treat this as an eviction. "There can be no constructive eviction without a surrender of possession of the premises by the tenant." 24 Cyc. 1180. See, also, to the same effect: *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; 11 Am. & Eng. Ency. Law (2d ed.), p. 479.

The lease from appellant to Dufresne furnished no basis for measuring the damages which the appellant sustained by reason of the injunction, and it was not admissible in evidence for the purpose of proving damages. *Mead v. Kalberg*, 70 Wash. 517, 127 Pac. 185. This is based upon the rule that a breach of the original contract does not entitle the injured party to recover as damages the gains or profits of collateral enterprises or subcontracts, where the collateral agreement or subcontract was made after the execution of the original contract. The reason is that the original contract was not made with reference to it, and that it would introduce an element of damages not known by or within the contemplation of the parties at the time they entered into the original contract. The appellant neither pleaded nor proved any damages which the law recognizes, unless it be nominal damages, which the court allowed.

The judgment is therefore affirmed.

CROW, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 10984. Department One. April 8, 1913.]

UNION TRUST AND SAVINGS BANK, *Appellant*, v. BENJAMIN E. AMERY, *Respondent*.¹

CORPORATIONS — CAPITAL STOCK — UNLAWFUL REDUCTION — BANKRUPTCY—ACTION BY TRUSTEE. A trustee in bankruptcy of an insolvent corporation may recover money paid out by the corporation in the purchase of its stock, if any creditor was injured thereby, whether the corporation was solvent or not at the time of the transaction.

CORPORATIONS—CAPITAL STOCK—REDUCTION IN FRAUD OF CREDITORS—ACTION TO RECOVER—INSTRUCTIONS. In an action by a creditor of an insolvent corporation to recover money unlawfully paid by the company for its capital stock, it is error to instruct the jury that if defendant sold the stock to the company and knew he was selling it to the company he would be liable, otherwise not; since his knowledge or good or bad faith was immaterial in case the corporation paid out money for its capital stock to the prejudice of creditors (MOUNT and PARKER, JJ., dissenting).

SAME—QUESTION FOR JURY. In such a case, the plaintiff is not entitled to a directed verdict, where there was a question of fact for the jury as to whether the stock was sold to and paid for by another instead of the corporation.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered June 24, 1912, upon the verdict of a jury rendered in favor of the defendant, in an action for money paid. Reversed.

Campbell & Goodwin, for appellant.

H. M. Stephens, for respondent.

Gose, J.—The plaintiff, as a trustee in bankruptcy for the estate of Syphers Machinery Company, a corporation, brought this action for the purpose of recovering from the defendant \$5,500, paid to him by the bankrupt corporation for 5,500 shares of its capital stock, alleging that he sold the stock to it prior to the time it was adjudged a bankrupt,

¹Reported in 131 Pac. 199.

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and that it thereby attempted to, and did, reduce its capital stock. A demurrer to the complaint was sustained and, upon appeal, the judgment was reversed. *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539.

A reference may be had to this case for a fuller statement of the allegations of the complaint. Thereafter, issue being joined, the case was tried to a jury, terminating in a verdict for the defendant. The plaintiff's motion for a judgment *non obstante*, or in the alternative for a new trial, was denied, and a judgment was entered for the defendant, from which the plaintiff prosecutes this appeal.

The appeal presents two questions: (1) Was the appellant entitled to a directed verdict, and (2) was the jury correctly instructed. These questions will be considered in the inverse order.

The only question for the jury to determine was, Did the corporation purchase the 5,500 shares of stock, or any part of it, and pay for it from its funds. If it did, and any creditor existing or subsequent was injured thereby, the money so paid may be recovered in this action. *Union Trust Co. v. Amery, supra*. In that case, after a reference to the provisions of our statute, we said:

"It follows, therefore, that, where the capital stock has not been diminished in compliance with the statute, the original articles of incorporation operate as a continuing representation on behalf of the corporation that its capital stock is unimpaired, and that the impairment of its capital stock in any other manner is a fraud upon its creditors, both as to the corporation and all others who participate in or profit by such an act."

In *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364, the court said:

"It is not alleged that the company was insolvent at the time the transaction occurred, but we think that is immaterial, since the thing which was unlawfully done reduced the available resources of a now insolvent company, and, if such re-

duction had not been made, the amount thereof should now be on hand for the benefit of creditors."

The respondent alleged and contended that he sold the stock to one W. H. Gray. The court instructed:

"And if you find that he did sell it [the stock] to the Syphers Machinery Company, and that he knew that he was selling it to the Syphers Machinery Company, the defendant will be liable; otherwise he will not."

This was error. The question is, what was actually done; not what the respondent thought, believed, or intended. The elements of knowledge and the good or bad faith of the respondent created a false issue. If the corporation paid any sum of money to the respondent in the purchase of any part of its capital stock on its own behalf to the prejudice of a creditor, it did the very thing the statute was designed to interdict, and such money is a part of its capital stock and a trust fund of the bankrupt.

Recurring to the first error assigned, i. e., the right of the appellant to a directed verdict, it suffices to say that the burden of proving the sale to the corporation devolved upon the appellant. If the stock was sold to Gray and paid for by him, as the respondent contends, the appellant cannot recover, and if Gray purchased and paid for a portion of it, the appellant cannot recover for that portion. It is not a question of bookkeeping, but a question of fact. From an examination of the entire record, we do not feel warranted in saying that there was no question of fact for the jury.

The judgment is reversed, with directions to grant a new trial in harmony with this opinion.

CROW, C. J., and CHADWICK, J., concur.

MOUNT and PARKER, JJ., (dissenting)—We think the instruction was right, and therefore dissent.

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[No. 10883. Department One. April 9, 1913.]

ANDREW JOHNSON, *Respondent*, v. S. A. MANN, *Appellant*.¹

ATTORNEY AND CLIENT—CONTRACT FOR COMPENSATION—FRAUD OF ATTORNEY—EVIDENCE—ISSUES AND INSTRUCTIONS. In an action to recover money paid to an attorney as a fee for defending plaintiff, on the ground of misrepresentations as to the seriousness of the charge, it is error to try the case on the theory that the plaintiff could recover all or no part of the money paid, where it appears that the attorney was not discharged, but performed various services, securing the plaintiff's release on bail, argued a demurrer, investigated the facts, secured a separate trial, and sat through the trial of the other defendants, whereupon plaintiff was discharged; since the issues to be presented are, was the plaintiff overreached; and if so, what was the reasonable value of the services performed.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 14, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for money paid. Reversed.

Lucius G. Nash, for appellant.

Crandell & Crandell, for respondent.

GOSE, J.—On the 6th day of March, 1911, the plaintiff was arrested upon two criminal charges, and lodged in the city jail in the city of Spokane, where he remained in confinement until the 15th day of March following. In one of the complaints, the plaintiff and two other persons were charged jointly with having conspired together to kill one N. S. Pratt. In the other complaint, the plaintiff and the same persons were jointly charged with having threatened to kill the said Pratt. Several days after the plaintiff had been arrested, the defendant, an attorney at law, called upon him in the city jail, whether at the request of the plaintiff or at his own instance being a disputed question, the plaintiff as-

¹Reported in 131 Pac. 213.

serting the latter and the defendant the former. At this interview, the plaintiff gave the defendant the following order:

"Spokane City Jail, March 15, 1911.

"Chief of Police: Kindly deliver to bearer, Mr. S. A. Mann, the sum of Two Hundred & Fifty dollars (\$250.00) money held by your office to my credit, as part atty. fees. Andrew Johnson, Prisoner.

O. K. W. J. Doust, Chief of Police. O. K. by W. D. Nelson."

The city authorities then held \$763 of the plaintiff's money, out of which fund the order was honored. The defendant then commenced to act as attorney for the plaintiff, and as such got him admitted to bail, \$500 cash being furnished therefor by the plaintiff. The plaintiff is sixty-three years of age, can read and write, was born in Sweden, came to this country when he was twenty-one years of age, lived eleven years in St. Paul, had lived four years in Spokane, has been a citizen of this country for a quarter of a century, and is a common laborer by occupation. He brought this action, alleging his arrest and confinement in the city jail; that he had never before been incarcerated; that his arrest and confinement caused him great fear and apprehension; that, on the 15th day of March, while confined in jail and in a troubled state of mind, the defendant came to him and represented that he, the plaintiff, was charged with a very serious offense "of which he was liable to be convicted and for which he was liable to be sentenced to the penitentiary for a long term;" that he, the defendant, could "secure plaintiff's release and discharge" from prison, but that "it would require a great deal of work and money expended," to the amount of \$250; that in fact there was no evidence against the plaintiff and no work was required to secure his release and discharge; that these representations were false and untrue; and that, "believing and relying on said representations of defendant herein set forth in this complaint, this plaintiff signed an order whereby defendant was enabled to and did draw and receive \$250 of defendant's money, and that thereby, and as a

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result of defendant's herein alleged and aforesaid false and fraudulent representations to plaintiff, this plaintiff was injured and defrauded out of his property and money in the sum of \$250." It is further alleged that the plaintiff was discharged without a trial; that the defendant rendered no service and expended no money; that, immediately after his release from jail, and on the 16th day of March, the plaintiff, having discovered the fraud, notified the defendant of the fact, informed him that he did not desire him to act as his attorney, and demanded a return of the \$250, which the defendant refused. The prayer is for a judgment for \$250 and interest from the date of the order. Issue was joined on the charges of solicitation and fraud. The case was tried to a jury, and resulted in a verdict for \$250, which was made effective by a judgment entered for that amount, with interest from the 6th day of December, 1911. The defendant has appealed.

The errors assigned are, (1) error in denying the appellant's motion for a nonsuit, and (2) error in denying his motion at the close of the trial for a directed verdict. These assignments present a single question, namely, the sufficiency of the evidence to support the verdict. The charges of fraud, when condensed, are three in number; (1) that the respondent if convicted might be sentenced to a long term of imprisonment in the penitentiary; (2) that the appellant could clear him; and (3) that it would require "a great deal of work and money expended."

The respondent testified that the appellant told him in the jail that "he was liable to go to the penitentiary;" that it frightened him, and that the appellant said that he could not promise to clear him. When asked by his attorney whether he believed the statement that he might be sent to the penitentiary, he answered, "I don't know to believe or not." He further said that the appellant told him that the charge "was very serious." After he had been admitted to bail, he, with a committee of three persons appointed by a labor union of

which he was a member, called upon the appellant. The evidence touching this visit is:

“Q. Tell the jury now what you said and what was said to Judge Mann up there. A. Well, I asked him for the money; I want that money; I said if you give me \$200 back I will let you have fifty dollars. So he said, ‘No, I won’t give you a cent I won’t give you a cent.’ Q. Did you say anything at that time about not wanting him to do anything for you? A. No. Well, no I—he didn’t do anything for me, never done any service, never done anything. Mr. Crow: Well, of course, that is a conclusion, and I move that it be stricken. Q. And did you tell him that you did not want him to work for you any more after that? A. I can’t recollect that. Q. You can’t recollect? A. No.”

A member of this committee testified:

“A. We told Judge Mann we considered a fee of two hundred and fifty dollars for defending Mr. Johnson was pretty high, considering Mr. Johnson’s circumstances and the nature of the case. So we had quite a long talk with the judge, all four of us, I believe, spoke with him, and the judge contended that—Mr. Crow: I object to the statement. Mr. Crandell: Q. What did the judge say? A. The judge said that the fee was normal. If they had gone to other lawyers they would charge as much more. So we told him then that we believed that we would discharge him from the case, and that he should take his fee, pay out of the fee and return the balance back. Q. What did the judge say to that? A. He said he had gone to a great deal of trouble and work in the case up to that time and his discharge from the case—he didn’t think there would be any balance; he thought he had earned it all. Q. Did he refuse to give back any of the money? A. Yes, sir.”

Another member of the committee testified that:

“A. We told Mr. Mann that we thought two hundred and fifty dollars was unreasonable for a case of that kind, and the nature it was, and that we could get other lawyers for a smaller sum. And he said he thought it was very reasonable, and we asked him if they objected to his getting another lawyer. He said he didn’t. We asked him if he would give us the money back and he said that he would not, and we

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told him then that we would hire another attorney . . .
Q. I will make it a little more specific. What was the offense charged against Mr. Johnson? A. My understanding at that time that he was a witness for these other two men.
Q. You thought two hundred fifty dollars was too much for getting a witness out of jail—is that it? A. Yes, sir. Q. Did you know at that time there was a charge of conspiracy against Mr. Johnson? A. I don't remember. Q. Did you know at that time that there was a charge of threatening to kill against Mr. Johnson, an entirely distinct and separate case? A. No, sir."

The statute, Rem. & Bal. Code, § 2267, provides that the penalty for a conviction for a gross misdemeanor, which includes a conspiracy to commit a crime (Rem. & Bal. Code, § 2382), shall be imprisonment in the county jail "for not more than one year or by a fine of not more than \$1,000, or both." It may be remarked that the offense of conspiring to commit murder is a serious offense. The respondent's version is that the appellant represented that the penalty was imprisonment in the penitentiary. This the appellant denies. The record and other undisputed evidence shows that the respondent was admitted to bail upon the application of the appellant before the committee waited upon him; that later the appellant argued a demurrer to the complaint, investigated the facts so far as he could, obtained an order giving the respondent a separate trial, sat in the trial of the other defendants, and at its conclusion moved and obtained a discharge of the respondent.

We are not aware of any principle of law, and no authority has been called to our attention, which would permit the respondent to recover the entire amount paid to the appellant, allowing him nothing whatever for his services. The theory of the case was, and the court instructed, that the respondent must recover the \$250 or nothing. The authorities cited by the respondent state the admitted rule that, where an attorney purchases property from his client and the latter seeks a rescission upon the ground of fraud, the conduct of

the attorney will be subjected to the closest scrutiny, and the burden will be upon him of proving that his conduct was open and honest, and that he advised his client as fully and disinterestedly as he would have done had the client been dealing with a third party. This rule is based upon the fiduciary relation which exists between an attorney and his client, which arises concurrently with the closing of the contract of employment. The rule and its limitations are stated in the note to *Shirk v. Neible*, 83 Am. St. 185, as follows:

"In matters other than those concerning fees, an attorney and client are not absolutely prohibited by law from contracting with each other, nor does the law declare all such contracts either void or voidable, but such a transaction is closely scrutinized by the courts, and often declared to be voidable, when it would be deemed unobjectionable between other parties."

The statute, Rem. & Bal. Code, § 137 *et seq.*, provides a method for a change of attorneys in cases pending in court. Under the statute, there can be no change of attorneys in a case pending until the charges of the attorney have been paid. The appellant, however, had his fee, and the respondent was at liberty to discharge him and employ other counsel if he chose to do so. The evidence does not show a discharge. Clearly the respondent may not recover the entire sum paid to the appellant. The appellant is entitled to the contract value of his services unless he intentionally misrepresented the penalty of the crimes or the magnitude of the services to be performed. If he did so misrepresent, he is entitled to the reasonable value of his services. The respondent may not have both the services and the money. If I pay a grocer one dollar for a package of flour weighing ten pounds upon his representation that it weighs twenty pounds, I cannot keep the flour and recover the one dollar. I may return the flour and have my dollar, or I may recover an amount representing the difference between the value of the package as it was and as it was represented to be.

The case was commenced and tried upon a fundamentally

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wrong theory. The court correctly instructed that the burden of proof was upon the plaintiff. This is because a contract for the employment of an attorney for the rendition of professional services, unlike a contract between an attorney and client in matters of property, is not looked upon with disfavor, and the burden of proving the fraud was upon the respondent.

The judgment is reversed, with directions to permit the parties to recast their pleadings so as to present two questions: First—Was the respondent overreached, as we have defined that term, in making the contract? Second—If so, what was the reasonable value of the appellant's services?

CHADWICK, MOUNT, PARKER, and MAIN, JJ., concur.

[No. 10989. Department One. April 9, 1913.]

H. A. FOSTER, *Respondent*, v. W. J. HINDLEY,
*Commissioner etc., et al., Appellants.*¹

MUNICIPAL CORPORATIONS—OFFICERS—CIVIL SERVICE REGULATIONS—REMOVAL—POWER TO DISCONTINUE OFFICE. Under § 24 of the Spokane charter providing that the council shall have the power to discontinue all offices and employments except certain enumerated offices, and § 55 providing for the suspension of employees by the heads of departments on filing charges, an office may be "discontinued" only by the council, and an attempted discontinuance by the mayor of the office of sanitary inspector in the health department, who was continued in office at the adoption of the new charter by § 53, is a nullity.

SAME—CHARTER PROVISIONS—ADOPTION—EFFECT ON OFFICERS CONTINUED IN OFFICE. The adoption of the new city charter of Spokane in 1910 did not discontinue the office of sanitary inspector in the health department, where the new charter only reorganized the department, and by § 53 the new charter provided that employees within the scope of the article (including sanitary inspectors) who are in office at the time of the adoption of the charter shall retain their positions unless removed for cause, and they were afterwards placed in the classified civil service list and made permanent.

¹Reported in 131 Pac. 197.

SAME—OFFICERS—SALARY OF WRONGFULLY REMOVED OFFICER. A sanitary inspector who was wrongfully separated from his office may recover the salary for the period, where he held himself ready to perform his official duties, and it is immaterial that he declined other temporary employment tendered by the city.

SAME — OFFICERS — WRONGFUL REMOVAL — REMEDIES—APPEAL TO CIVIL SERVICE COMMISSIONER. Under § 55 of the Spokane charter providing for the suspension of an officer for cause upon a hearing, and appeal therefrom, an officer removed by subterfuge of an unauthorized "discontinuance" of the office, without a hearing, is not required to appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 28, 1912, upon findings in favor of the plaintiff, in an action to recover an office and salary. Affirmed.

H. M. Stephens and *Wm. E. Richardson*, for appellants.

E. O. Conner, for respondent.

Gose, J.—This action was brought to secure the restoration of the plaintiff to the office of sanitary inspector in the health department of the city of Spokane, and to recover the salary incident to the office during the period of separation. The mayor and the city have appealed from a judgment protecting the plaintiff in each of these alleged rights.

The findings, in substance, are as follows: The respondent was appointed sanitary inspector in the health department of the city in the month of June, 1909, and continued until he was removed by the mayor on the 31st day of May, 1911. The city adopted a new charter on the 28th day of December, 1910. The commissioners elected thereunder entered into office on the 14th day of March, 1911. In April, 1911, respondent, as such inspector, was placed in the classified civil service in division B of the health department, class 4, grade 1, which position was "made permanent." The classification was approved by ordinance. On the 23d day of May, 1911, the city by ordinance added and appointed two inspectors in

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addition to the three appointed under the previous charter and ordinances. On the 31st day of May following, there were five such inspectors, the respondent being the senior inspector in rank and period of service. On that day, the appellant Hindley, as mayor, notified him in writing that his office was "discontinued."

The appellants make three contentions: (1) That the removal was regular; (2) that the respondent was not entitled to recover his salary; and (3) that his remedy was by appeal to the civil service commission.

Section 53 of the new charter provides:

"Employees within the scope of this article [which included the respondent] who are in office at the time of the adoption of this charter shall retain their positions unless removed for cause."

Three sanitary inspectors were provided for by ordinance under the old charter. The ordinance was continued in force by § 119 of the new charter. Section 55 provides that any employee may be *suspended* by the head of the department under which he is employed. It requires the officer making the order to forthwith file with the civil service commission a statement of the suspension and the reasons therefor. The method of procedure in suspension cases was provided for by an ordinance passed on April 27, 1911. Section 24 of the charter provides that the council, after each general election, shall appoint certain enumerated officers not including health officers, and that it "shall have power to create and discontinue all other offices and employments from time to time and as occasion may require." The respondent was an employee "in office" at the time of the adoption of the charter, and the council, not the mayor, had the power to discontinue his office.

The appellants argue that the health department ceased to exist upon the adoption of the new charter. There was no hiatus in the passing of the city from the old charter to the

new. The city continued and remained the same entity. There was no abdication of any of the powers essential to orderly government. The health department was reorganized under the new system, but the necessity for sanitary officers was as exigent under the new charter as the old, and this necessity was recognized and these officers were placed in the classified civil service as required by section 53 of the charter. This had been done before the mayor sought to discontinue the office which the respondent held. The case is controlled by *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 968.

The respondent, although wrongfully deprived of his office, held himself ready and willing to perform his official duties. Hence, he is entitled to his salary for the period during which he was unlawfully separated from his office. *Bringgold v. Spokane*, 27 Wash. 202, 67 Pac. 612; *United States v. Wickersham*, 201 U. S. 390. The fact that he declined a temporary employment tendered by the city does not militate against the enforcement of this right. *Reising v. Portland*, 57 Ore. 295, 111 Pac. 377.

Nor was the respondent required to appeal to the civil service commission under the provisions of § 55 of the charter. It has reference to suspensions for cause, not to a case of usurpation of authority. The mayor did not seek to suspend the respondent for cause, but resorted to the subterfuge of discontinuing the office. This power, as we have seen, is lodged in the council. The mayor's letter to the respondent states that "the office that you now hold is discontinued." In his letter of the same date addressed to the civil service commission, he reports that "in accordance with the provisions of rule 12 of the civil service rules, I make the following report of separation from this department. . . . Foster, Horace A., Sanitary Inspector, . . . Cause of separation, reduction of force." The act of the mayor was a nullity, and the respondent properly so treated it. *Chicago v. Gillen*,

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222 Ill. 112, 78 N. E. 13; *Powell v. Bullis*, 221 Ill. 379, 77 N. E. 575.

The judgment is affirmed.

CROW, C. J., MOUNT, and CHADWICK, JJ., concur.

PARKER, J., concurs in the result.

[No. 10865. Department One. April 9, 1913.]

R. E. HARRIS, *Appellant*, v. ALEXANDER B. STEWART *et al.*,
Respondents.¹

CORPORATIONS—STOCK—SALE—RESCISSION FOR FRAUD—EVIDENCE—SUFFICIENCY. The purchaser of stock in a drug corporation, upon the recommendation of the defendant, who was the undisclosed owner of the stock, cannot be rescinded for fraud, where it appears that no confidential relations existed between the parties, the purchaser was experienced in the business, made his own investigation of the stock and learned its value and the amount of the debts against it, and purchased with full knowledge thereof; and did not promptly offer to rescind when he learned of the vendor's interest in the stock.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 12, 1912, upon findings in favor of the defendant, in an action for rescission and recovery of money paid, after a trial to the court. Affirmed.

Frank E. Green and Brady & Rummens, for appellant.

Higgins & Hughes and Force & Ballinger (Hyman Zettler, of counsel), for respondents.

MOUNT, J.—The plaintiff brought this action to rescind a purchase of the capital stock of a drug company, known as the Raven Drug Company, in Seattle, and to recover from the defendant Stewart the money paid by plaintiff for the stock of that company. The plaintiff seeks to recover upon the ground that Mr. Stewart was a large owner of the stock

¹Reported in 131 Pac. 212.

of the company, which was unknown to the plaintiff at the time of the purchase; that Stewart recommended the purchase of the stock as a good investment; that plaintiff relied upon that recommendation and regarded Mr. Stewart as a friend and confidential agent; that after the purchase of the stock, plaintiff learned that it was of no value, and that this fact was known to the defendant Stewart at the time of the purchase. These facts were all put in issue. The case was tried to the court, and findings were made against the plaintiff and the action was dismissed. Plaintiff has appealed.

He argues that the judgment should be reversed upon disputed questions of fact wholly. It appears that the plaintiff had been in the drug business in the state of Montana for several years prior to the year 1909. In that year he sold his Montana business and came to Seattle. In August he called upon Mr. Stewart and was introduced by plaintiff's brother, who was then in the employ of the Stewart & Holmes Drug Company. Mr. Stewart was the president of the Stewart & Holmes Drug Company, which did a large wholesale drug business. Plaintiff had had some dealing with the Stewart & Holmes Drug Company prior to the time he came to Seattle. Soon after plaintiff arrived in Seattle, he sought employment as a traveling salesman from the Stewart & Holmes Drug Company. Mr. Stewart did not employ the plaintiff, but suggested that he go into business in Seattle, and suggested that he purchase an interest in the Raven Drug Company. The stock of that company was all held in the name of H. S. Elwood, but was owned by Elwood who owned one half thereof in his own right, and Mr. Stewart who owned a quarter of the stock, and by Mr. Hoge who owned the other quarter. Mr. Stewart did not disclose his interest in the stock, but agreed to arrange a meeting between plaintiff and Mr. Elwood, which was done. Plaintiff thereupon entered into negotiations with Mr. Elwood, which resulted in the purchase by the plaintiff of one-half of the capital stock of the

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Raven Drug Company for \$14,700. Before the purchase was made, the plaintiff examined the stock and books of the company, and learned the condition of the company and the amount of its debts, and the names of the creditors, one of whom was the Stewart & Holmes Drug Company to the amount of \$6,000. It was finally agreed between Mr. Elwood and the plaintiff that the purchase money paid by the plaintiff for the stock should go toward the liquidation of the debts and not be paid to the stockholders. This was accordingly done. In August, 1909, the plaintiff with Elwood went into possession of the business. Two or three months later, plaintiff learned that Stewart was a part owner of the stock of the Raven Drug Company, but made no complaint and did not offer to rescind the sale. The business was continued by plaintiff and Elwood for more than a year, when, in November, 1910, the plaintiff became president and sole manager of the business of the Raven Drug Company and about a month later sold his interest.

There are at least three grounds any one of which is sufficient to sustain the conclusion of the trial court: (1) The plaintiff failed to show that there were any confidential relations existing between him and the defendant Stewart. (2) Even if there were such relations, the plaintiff did not rely thereon, but made an independent investigation of the property he bought, learned its value, and the debts existing against it, and purchased with the full knowledge of the condition thereof; he was experienced in the business and purchased not upon representations of the defendant Stewart but upon his own knowledge and judgment. And (3) after the plaintiff learned of defendant's interest—if such interest was material—and after he had been in actual possession for a period of two or three months and knew all about the business, he made no complaint and did not offer to rescind the contract on that account. It was his duty upon discovering the facts to at once announce his intention to rescind. *Eld-*

ridge v. Young America etc. Min. Co., 27 Wash. 297, 67 Pac. 708. This he did not do. The judgment must therefore be affirmed.

CROW, C. J., PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 10118. Department One. April 10, 1913.]

GEORGE NATH, *Respondent*, v. OREGON RAILROAD &
NAVIGATION COMPANY, *Appellant*.¹

COMPROMISE AND SETTLEMENT—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY. A settlement cannot be avoided on the ground of fraud in representing that the injuries sustained were temporary and could be cured, where it appears that plaintiff, who was seriously injured about his legs and feet, after several interviews made a settlement and signed a release in consideration of \$430, and made no complaint or attempt to rescind until more than two years thereafter, and it was not shown that he was not in his right mind or did not read the release, or that the representations were not honest expressions of opinion.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered June 28, 1911, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by an employee engaged in unloading coal cars. Reversed.

W. W. Cotton, W. A. Robbins, and Dunphy, Evans & Garrecht, for appellant.

John F. Watson, for respondent.

CROW, C. J.—Action by George Nath against the Oregon Railway & Navigation Company to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

For some years respondent had been working for appellant under written contract, unloading coal from cars into chutes. He employed his own help and was paid by the ton for coal

¹Reported in 131 Pac. 251.

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handled. The chutes were located on an elevated trestle approached by a railway track having a ten per cent grade. On the trestle and opposite the chutes the track was practically level. Cars of coal were placed at the upper end of the elevated track near the chutes. As the coal was unloaded, respondent and his assistants would move a car with a pinch bar upon the level track from chute to chute, controlling it with blocks upon the track and a hand brake. On February 18, 1907, respondent was on one of the cars which was being moved from one chute to another. His assistant with a bar was pinching the car along, intending to spot it opposite the last chute toward the inclined track. In the progress of the work, respondent attempted to control the car with a hand brake. The brake would not work. Respondent lost control, and the car started down the incline. To save himself, respondent jumped from the car and was injured. He contends that appellant was negligent in failing to inspect the brake, and in not furnishing proper and safe appliances.

The controlling question on this appeal is whether the trial court erred in denying appellant's motion for a directed verdict. Several defenses were pleaded, upon which appellant now relies. We only find it necessary to consider the defense that respondent had made a settlement with appellant and had released it from further liability. Respondent contends that the release was fraudulently procured and was void.

In passing upon the sufficiency of the evidence to sustain a finding that the release was void, we must consider it most favorably to respondent. Thus considered it shows that the accident occurred on February 18, 1907; that respondent sustained serious injuries to his feet and legs although no bones were broken; that he was taken to appellant's hospital where he was attended by Dr. E. E. Shaw, the physician and surgeon of the appellant corporation. Within a few days, appellant contended, and respondent seems to have conceded, that, being a contractor and not appellant's servant, respondent was not entitled to hospital and surgeon's care at

appellant's expense. Respondent remained at the hospital a short time when he was removed to his home. About two weeks after the accident, he had an interview with one George Smith, appellant's claim agent, relative to a settlement of his claim for damages. He testified that Mr. Smith said he should not hire a lawyer; that his injuries were temporary; and that appellant would see that all was right, but that no definite terms of settlement were then discussed. He further testified that he again saw Mr. Smith a week or ten days later; that Smith then made him an offer which was refused; that afterwards on April 16, 1907, at their last interview, they agreed upon a settlement for \$430, which was then paid by appellant, and that respondent then signed the release. No contention is made that respondent was not in his right mind, nor was it shown that he did not read the release. There is nothing in the record to show that he complained of the settlement or attempted to rescind it, until the commencement of this action more than two years thereafter. He now seeks to avoid the release on the ground that Dr. Shaw and the claim agent assured him that his injuries were not permanent, but that he would recover within five months from the date of the accident. He testified that he trusted and confided in them.

Even though Dr. Shaw and the claim agent did tell respondent he would recover within five months, and even though he believed these statements, yet no fraud has been shown. The evidence is not sufficient to sustain a finding that Smith's and Shaw's statements were false or fraudulent, or that they were anything further than an honest expression of opinion, in which respondent concurred. A physician and surgeon cannot be held responsible for an honest mistake or error in judgment. It is not contended that Dr. Shaw was not competent or qualified. The evidence shows that he has been employed by respondent since the occurrences of which respondent now complains. The law favors an amicable settlement of claims of this character, and when such a settle-

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ment appears to have been fairly made, and has not been secured by fraud, false representations or overreaching, it must be sustained. *Owens v. Norwood White Coal Co.*, (Iowa), 138 N. W. 483, 491; *Schweikert v. Davis Lumber Co.*, 147 Wis. 242, 133 N. W. 136; *Railway Co. v. Bennett*, 63 Kan. 781, 66 Pac. 1018.

To avoid a settlement on the ground of fraud, requires clear and convincing proof. The most convincing evidence should be required in a case such as this, where the validity of the settlement was not questioned for more than two years. If respondent was defrauded and misled, as he now contends, he should have discovered that fact long prior to the commencement of this action. Yet he retained the money, worked for appellant at hard labor, and for more than two years made no attempt to rescind. The undisputed evidence shows that on November 1, 1907, less than nine months after his injury, he was employed by appellant as one of its bridge repairing crew; that he worked twenty-six days in November; twenty-seven days in December; a number of days in January, 1908, and also in the following February and March; yet during all this time there was no suggestion by him that he had been defrauded.

In *Garver v. Great Northern R. Co.*, 56 Wash. 519, 106 Pac. 192, it appears that plaintiff, an employee of a transfer company, while engaged in unloading freight, was injured by defendant's negligence. Thereafter a settlement was made, whereby in consideration of \$500 he released the company. Later plaintiff contended that the alleged settlement had been fraudulently obtained; that he did not know it was a settlement; that he understood he was being compensated for loss of time only; that he reposed special confidence in the claim agent and the physician of the company; that they misrepresented the probable extent and duration of his injuries, and that he did not know the nature or contents of the papers which he executed. Yet his evidence disclosed that his mind was clear; that he knew what occurred at the time the settle-

ment was made; that the claim agent first suggested a settlement for the sum of \$175, but that finally it was made for \$500. The lower court held that the settlement was binding, and this court in affirming its decision held that no fraud had been practiced upon the plaintiff, as he had an opportunity to read the release, failed to do so, retained the \$500, and had dealt at arm's length with the defendant. In this case it is not asserted that appellant did not understand the settlement he was making. His only contention is that he was deceived by the opinion of the physician and claim agent which he insists were representations of fact. After a careful consideration of the entire record, we conclude that sufficient evidence to sustain a finding that the release was fraudulently obtained has not been produced. The motion for a directed verdict should have been sustained. The judgment is reversed, and the cause remanded with instructions to dismiss.

PARKER, CHADWICK, GOSE, and ELLIS, JJ., concur.

[No. 10708. Department One. April 10, 1913.]

FRANK LACAFF, *Respondent*, v. ROSLYN-CASCADE COAL COMPANY, *Appellant*.¹

MASTER AND SERVANT—SAFE PLACE—COAL MINE—EVIDENCE—QUESTION FOR JURY. Where miners were required to follow their cars down an incline, without sufficient light, where depressions were constantly forming between the rails, so that when a co-employee stumbled and lost his hold on a car, it ran down the incline upon the plaintiff and injured him, the questions as to the reasonable safety of the place and sufficient inspection are for the jury.

SAME—ASSUMPTION OF RISKS—QUESTION FOR JURY. A coal miner, required to follow cars down an incline, does not, from his knowledge of the general condition of the ground, assume the risks of a co-

¹Reported in 131 Pac. 194.

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employee stumbling in a depression and losing control of a car which came down upon him, where it was the duty of the track man to make a daily inspection of the track.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such a case, a miner is not guilty of contributory negligence, as a matter of law, in making a customary stop without looking back, to put an extra brake on his car, which was apparently necessary by reason of a change in the grade of the incline.

SAME—PLEADING, ISSUES AND PROOF—"OBSTRUCTIONS" ON TRACK. Under an allegation of negligence in allowing "obstructions" between the rails of a track in a coal mine, which caused a miner to stumble and lose control of a car, it is admissible to prove a "depression" between the rails.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered April 17, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a coal miner through defective appliances. Affirmed.

Kerr & McCord, for appellant.

Pruyn & Hoeffler and *E. K. Brown*, for respondent.

PARKER, J.—The plaintiff, a coal miner, seeks recovery of damages for personal injuries which he claims resulted to him from the negligence of the defendant in its defective maintenance of a track and the space between the rails thereof in one of its tunnels or inclines in its coal mine, which defect was the proximate cause of a car getting beyond control and running down the incline upon and injuring him. The trial having resulted in a verdict and judgment in favor of the plaintiff, the defendant has appealed.

On November 11, 1910, at the time respondent received his injuries, he was employed as a coal miner by appellant. The incline through which the coal was being removed from the mine was several hundred feet long, and descended into the mine on about a six per cent grade. There branched off from this incline several rooms from which the coal was being mined. There was laid upon the incline a track consist-

ing of iron rails about two inches high and twenty-four inches apart, upon ties about four feet long. Branch tracks led into the several rooms. The cars which ran over the track in removing the coal were three and one-half feet high, two and one-half feet wide, and eight feet long, and each car when empty weighed about 850 pounds. Each car ran upon four ten-inch wheels, which were sufficiently open so that a stick of wood a foot or more long, called a sprag, could be inserted through a wheel and lock it by the sprag coming in contact with the body of the car. The cars were lowered into the mine along the incline by the miners themselves. A miner would place a sprag in a wheel of his car at the top of the incline, walk behind the car, and hold it from running away as he let it down the incline to the switch leading into his room where he was mining, where he would push the car into his room, and when he had filled it with coal, he would push it out to the incline track, where the driver with a mule would hitch onto the car and draw it out up the incline. The miner would then follow the car out, when he would in the same manner lower another car into the mine for filling. In this manner he would take down the incline, fill, and cause to be removed, from eight to twelve cars per day.

Respondent and one Zupitil, among other miners, were working in the mine in this manner. Respondent was working in a room off the incline, a short distance below the room in which Zupitil was working. On the morning of November 4, 1910, respondent and Zupitil were together at the top of the incline, ready to go to work. Respondent started down the incline with his car, followed by Zupitil with his car some twenty or thirty feet in the rear. When respondent reached a point in the incline almost opposite Zupitil's room, he stopped his car for the purpose of inserting an additional sprag in another wheel of the car. This, he testified, was rendered necessary because the grade of the incline changed at that point and was steeper beyond, and it was customary for him to stop his car at that point for that purpose. An instant

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after he had stopped, and while he was reaching around to the side of the car to place the extra sprag in a wheel, his leg was caught between the bumpers of Zupitil's car and his own car, whereby he was seriously injured.

It seems that his stop would have been only for a few seconds, even had he not been overtaken by Zupitil's car, for evidently the placing of the extra sprag in a wheel was only the work of a moment. A short distance up the incline from where respondent stopped, probably twenty or thirty feet, being the distance at which Zupitil was following, a branch track led off into a room. Zupitil's testimony is, in substance, that, when he reached this point, he stepped into a hole or depression just behind the lead rail of the switch, and tripped upon the rail, causing him to fall and lose his hold upon his car. This resulted in its escaping from him and running down upon respondent. It only required a few pounds resistance to hold the empty car and control it with one sprag in the wheel on this part of the track. But when the car was released from Zupitil's hold, it gained some additional momentum, which, with its heavy weight, was sufficient to strike a heavy blow upon respondent's car, even though it had then acquired but little speed. There was no light in the mine except the lights carried by the miners upon their caps, and Zupitil while following behind his car could not see very well ahead, so as to plainly distinguish the condition of the ground between the rails along where he would have to walk. Both respondent and Zupitil had worked in the mine for a long time, and had such acquaintance with the conditions of the ground along between the rails as their frequent going in and out of the mine would furnish them. It was necessary to a proper operation of the mine to keep the ground between the rails suitable for the men and the mules to walk on, and it was so used a great deal. The constant passing over it by the mules caused holes to be worn between the ties, which required filling from time to time in order to keep the surface in a properly usable condition. Appellant's track man passed

along the track daily and inspected it with a view to keeping it in proper working order, and this has reference to the ground between the rails as well as the track proper. The depression in which Zupitil stepped when he tripped and lost the control of his car was six to eight inches in depth from the top of the lead rail, and was very close to it, possibly extended under it. The lead rail is the rail of the branch track that crosses diagonally between the rails of the main incline track.

The allowing by appellant of the creation of the depression at the guide rail to the extent of six or eight inches below the top thereof without repair by filling in so as to make the ground comparatively smooth for the travel of the men, especially in lowering the cars along the incline, is the principal act of negligence relied upon by respondent for recovery, rested upon the theory that appellant thus violated its duty to respondent in failing to furnish him a reasonably safe place in which to work. Counsel for appellant argue that it would be imposing on appellant too high a degree of care to require it to keep the ground between the rails any freer from obstructions and depressions than is here shown. In view of the manner in which the miners were required to lower the cars along this incline, the fact that no light was furnished other than the lights in the miner's caps, the fact that the view of the track immediately ahead of a miner while lowering his car was in a measure obstructed by his car, and the fact that appellant's track man was present and passing over the track daily for the very purpose of inspecting and seeing to the keeping of the track, including the space between the rails in suitable condition for use, we think the question of the reasonable safety of the place was one for the jury, and that it cannot be determined in appellant's favor as a matter of law.

It is contended that, even though appellant did not fully comply with its duty in furnishing respondent a safe place to work, yet by reason of respondent's knowledge of the con-

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ditions there existing, he assumed the risk of being injured in the manner here shown. It is true that respondent must have had some knowledge of the general condition of the ground between the rails over which he and the other miners had to walk in lowering the cars down the incline, but it seems to us, like the question of a reasonably safe place in which to work, the assumption of risk on the part of respondent became a question for the jury in view of the facts we have noted, and especially in view of the fact of the daily inspection of the track man for the purpose of seeing that the condition of the track, including the space between the rails, was suitable and safe for the purpose for which it was being used. We think that it cannot be decided, as a matter of law, that respondent was doing more than a reasonable man would do under the circumstances in his continuing to work there.

Counsel call our attention to, and place their principal reliance upon, the decision of this court in *Krickeberg v. St. Paul & Tacoma Lumber Co.*, 37 Wash. 63, 79 Pac. 492. We think, however, a critical reading of the facts of that case as there related will show that it is distinguishable from the case before us. In that case it is apparent that the injured plaintiff had a greater degree of control over the horse and truck he was driving than the miners could possibly have over their cars in this case. He even had a choice of tracks, as he was not compelled to have the wheels of his truck run in the same place upon each trip. He was working in the glare of electric lights, so that every defect and uneven feature of the plank road over which he was driving was plainly visible to him. It also appears that his truck had a tendency on previous occasions while he was using it to do the very thing that caused his injury. Nor did the mill company assume to render a daily inspection of the road over which the plaintiff was driving the truck. The following cases, cited and relied upon by counsel for appellant, we think are subject to substantially the same distinction: *French v. First Avenue R. Co.*,

24 Wash. 88, 68 Pac. 1108; *Ford v. Heffernan Engine Works*, 48 Wash. 315, 98 Pac. 417; *Mayer v. Queen City Lumber Co.*, 64 Wash. 567, 117 Pac. 392.

Some contention is made rested upon the alleged contributory negligence of respondent. We think the only possible foundation for this contention is found in the fact that respondent stopped upon the incline to put an extra sprag into a wheel of his car, without looking back to see if Zupitil's car was close upon him. It seems clear to us, in view of the fact that such a stop was customary with him, that it was apparently necessary, that it would in no event be for more than a few seconds, and that Zupitil would probably have control over his car, that the question of respondent's contributory negligence was for the jury. So far as the negligence of Zupitil is concerned, regarding such negligence as that of a fellow servant, we think the evidence is so devoid of any showing of negligence upon his part as to not call for comment from us touching that source of possible contributory negligence as a question of law.

It is contended that the trial court permitted the cause to go to the jury upon an issue of negligence not disclosed by the pleadings. This seems to be rested upon the fact that the negligence alleged in the pleadings refers to "obstructions" on the track and the space between the rails. It is argued that no evidence of obstructions was offered, and that the depression relied upon by respondents as an obstruction was in fact not an obstruction. This contention rests upon a too limited meaning of the word "obstruction." We think the word "obstruction" as there used applies to anything that interferes with, or renders dangerous, travel along the track, whether it consists of a physical object put there or of the removal of some portion of the traveled way. It has generally been so held when obstructions to public highways are spoken of; that is, a hole in a public highway or a ditch dug across it is in law an obstruction, the same as the building of a fence across it or the placing of any other

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physical object there. 37 Cyc. 247. In this sense, we think the depression into which Zupitil stepped, causing the loss of his hold upon the car, was an obstruction, and that the jury was warranted in believing that it was the proximate cause of respondent's injury.

The judgment is affirmed.

Crow, C. J., Gose, Chadwick, and Mount, JJ., concur.

[No. 10771. Department One. April 10, 1913.]

JOHN R. BUCHSER, *Appellant*, v. ANNIE BUCHSER,
Respondent.¹

EXECUTORS AND ADMINISTRATORS — APPOINTMENT—RIGHT TO LETTERS—HUSBAND AND WIFE—COMMUNITY PROPERTY. Under Rem. & Bal. Code, § 1389, giving the husband the preference right to letters of administration upon the estate of his deceased wife, he cannot be deprived thereof by the fact that he claimed to own the homestead as his separate property and declined to inventory it as belonging to the estate; since the rents and profits may be covered by the bond, pending determination of the title, the failure to mention the property does not defeat or cloud the title, and the court may take evidence to determine whether it shall be included in the inventory, under Rem. & Bal. Code, § 1450, requiring the administrator to make a true inventory, and § 1457, providing for revocation of his letters if he refuse to do so.

APPEAL—REVIEW—CESSATION OF CONTROVERSY—REHEARING. Where a case is settled pending appeal, by a waiver of appellant's right to administer an estate, it is the duty of the respondent to call the fact to the attention of the court; and after decision filed, the respondent cannot, on petition for a rehearing, ask a modification of the judgment on account of the waiver.

Appeal from an order of the superior court for Spokane county, Webster, J., entered February 8, 1912, appointing an administrator upon hearing conflicting applications therefor. Reversed.

¹Reported in 131 Pac. 193; 132 Pac. 239.

David Herman and Scott & Campbell, for appellant.

John Salisbury, for respondent.

CHADWICK, J.—Annie Buchser died intestate, leaving an estate in Spokane county, Washington. Her husband, John R. Buchser, applied for letters of administration, and upon the hearing he was questioned as to the value and extent of the property of the estate. He enumerated certain personal property of the value of about \$1,700. In answer to a question put by the court, it developed that he was the owner of 160 acres of land that had been taken up as a homestead, and 80 acres that he had purchased out of the proceeds of timber cut on the homestead. The petitioner husband claimed the land as his separate property. The court was of opinion that it was community property, and that "the real estate ought to be mentioned in the application in order to fix the bond." The matter was thereupon continued to a future date, in order to give counsel for the petitioner time to examine some of the cases heretofore decided by this court.

In the meantime, a daughter, Annie Buchser, petitioned for letters. When the matter came on for hearing, the husband through his counsel still maintained his position that the real estate was his separate property, but offered testimony as to the rents and profits in order to fix a bond pending the bringing or decision of a case (the record is not clear) in the Federal court. The court still insisted that the property should be brought in as community property, and refused to consider the rental value upon the husband's petition, his reason being that, if the property was indeed separate property, there was no justifiable reason for considering its value in this proceeding. The daughter Annie Buchser was then appointed administratrix, and her father has appealed.

The right of administration is a valuable right, and especially so where under our statutes there is a community of interest. The husband is the owner of one-half of the per-

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sonal property, and should not be denied the statutory preference (Rem. & Bal. Code, § 1389), unless there is some controlling reason. Under Rem. & Bal. Code, § 1366, the real property of a deceased person vests immediately in the heir, subject only to an administration the purpose of which is to pay the debts and define the interests of the distributees. The failure to mention such property in a petition for letters of administration can in no way affect the title; the right of the heir is not defeated or even clouded. Nor is the petitioner bound to yield any contention he may have as to title or ownership as a condition precedent to the granting of letters. An administrator is required to make a true inventory of the estate (Rem. & Bal. Code, § 1450); and it is also provided that, if the administrator shall neglect or refuse to return an inventory, his letters may be revoked. See Rem. & Bal. Code, § 1457. We have no doubt that the court might, under these provisions, take some testimony as to the character of the title to property claimed by some interested party—not for the purpose of determining the title; there is a way to do that by an appropriate independent proceeding if there be a claim by a stranger, or upon distribution if the claim be by one directly interested in the estate, but for the purpose of fixing a bond. Upon the filing of the inventory the court may:

“Determine *prima facie* the fact whether or not the property belongs to the estate and is an asset thereof. This adjudication is not binding upon any person afterwards claiming the property in another forum, but is for the purpose only of determining whether the administrator shall be forced to make an inventory thereof.” *In re Belt's Estate*, 29 Wash. 535, 70 Pac. 74, 92 Am. St. 916.

It does not follow that a surviving spouse is to be denied letters, being otherwise competent, because he claims certain property as his separate estate. His interests are not necessarily antagonistic, as was declared by the lower court.

"The finding that the surviving husband was incompetent to serve as administrator for want of integrity was evidently based upon the fact that he claimed the whole estate as his own; and the question is, Was the finding justified? We do not think it was. There was nothing in the fact named which showed a want of integrity, or disqualification." *Estate of Carmody*, 88 Cal. 616, 26 Pac. 373.

The title to the homestead property is not deraigned, and we cannot tell whether the claim of the husband is well founded; but whether it be so or not, it would not be improper for the court to order the property to be inventoried as community property the title to which is disputed, and accept the husband's offer to cover the possible rents, issues and profits by the usual bond. If it transpires that the property is in fact community property, the estate will be protected. If the title is finally adjudged to be in the husband, the estate has lost nothing.

Reversed, and remanded with instructions to revoke the letters issued to Annie Buchser, and to issue letters to John Buchser, the surviving husband, and to proceed with the administration as indicated in this opinion.

Crow, C. J., Gose, Mount, and Parker, JJ., concur.

ON PETITION FOR REHEARING.

[Decided May 17, 1913.]

PER CURIAM.—After the filing of our opinion in this case, respondent filed a petition asking that our judgment be modified. We held that appellant was entitled, as a matter of right, to administer upon the estate of his deceased wife, and that such right could not be abridged or taken away upon the showing made before the lower court. We are now asked to modify our judgment so that it will be a judgment for costs only "for the reason that at the time judgment was rendered by this court in this cause, the question in dispute between appellant and respondent had been settled and the controversy between them had ceased." It is then shown

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by affidavit, and by a certified copy of his waiver, that appellant had theretofore waived his right to administer in favor of respondent.

It is of no concern to this court who administers on the estate of Annie Buchser, deceased. We passed upon the question that was before us. If appellant desires to waive his right, he may do so, but his waiver must be made in the superior court. It was the duty of counsel to call our attention to the fact that the case had been settled, at the time it was settled. An order remanding the case would have been entered. Having imposed the burden of deciding the case upon this court, respondent may seek her rights under the waiver, if any she has, in the court below.

Petition denied.

[No. 10884. Department One. April 10, 1913.]

L. F. BOOTHE, *Appellant*, v. SUMMIT COAL MINING COMPANY *et al.*, *Appellants*, PEARL K. LINDEN *et al.*, *Respondents*.¹

CORPORATIONS—ACTIONS BY STOCKHOLDERS—FOR BENEFIT OF CORPORATION. In an action by a stockholder on behalf of himself and others similarly situated, in which there is a favorable termination, the benefit of which goes to the corporation, plaintiff is entitled to recover a reasonable attorney's fee and necessary disbursements, but such allowance will not be made to a stockholder owning half of the stock, in a controversy with the owner of the other half, in which a receiver was appointed on the theory of a partnership, and no one but the plaintiff was benefited by the result of the suit.

APPEAL—DECISION—"LAW OF THE CASE." Where the supreme court has decided, upon disputed evidence, the right of an officer of a corporation to draw a salary, the decision is the law of the case governing a retrial upon substantially the same evidence.

PARTNERSHIP—COMPENSATION OF PARTNERS. A partner cannot claim compensation from the partnership in the absence of an agreement therefor, even if he renders exceptional services; especially where an agreement had been made whereby each was to draw a like amount each month.

¹Reported in 131 Pac. 252.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered July 3, 1912, upon findings in favor of certain defendants, in an action for an accounting. Modified.

Kerr & McCord, for appellant Boothe.

J. L. Corrigan, for appellants Summit Coal Mining Company and R. J. Linden.

CHADWICK, J.—This case has been thrice appealed. 55 Wash. 167, 104 Pac. 207; 59 Wash. 610, 110 Pac. 536, and 63 Wash. 630, 116 Pac. 269. In the first appeal, the case was remanded with instructions to appoint a receiver and to take an accounting, this court saying:

“From all the evidence and circumstances before us, we conclude that Linden’s raise of salary was made to divert profits of the corporation to himself, without due regard to the rights of Boothe, and that Linden should account for all salary received by him, in excess of \$125 per month. Evidence was offered to show that his services were worth \$400 per month. This evidence was contradicted, but, under the circumstances, we shall not enter upon its consideration, the raise having been improperly made in violation of Linden’s agreement with Boothe, and without the latter’s knowledge and consent.”

An accounting has been had, and Boothe and Linden have both appealed.

One of the items allowed Boothe is the sum of \$5,000; \$2,500 for counsel fees and \$2,500 for costs and moneys disbursed by him in the preparation of his case and pending the several trials thereof. The rule undoubtedly is that, where a stockholder in his own behalf and in behalf of others similarly situated prosecutes a suit to a favorable termination and the benefit goes to the corporation, he will be entitled to recover a reasonable attorney’s fee as well as his necessary disbursements. 3 Cook, Corporations, § 379; *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 Pac. 647,

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Ann. Cas. 1912 C. 859; *McMillan v. Northport Smelting & Ref. Co.*, 49 Wash. 76, 94 Pac. 761. Such allowances are rarely if ever made, unless it is made to appear that some advantage is obtained for the corporation as distinguished from the interest of the individual stockholder.

In the first appeal (55 Wash. 167, 104 Pac. 207), it was strenuously insisted that a court of equity would not in any event appoint a receiver for a solvent corporation. Without denying that doctrine, but expressly reaffirming it, we took occasion to say that this case was exceptional. "It is *sui generis*." The parties Boothe and Linden are equally interested in the corporation. Some other names are connected with it as stockholders, but it is not denied by either party that these are dummies. We likened the case to one of partnership, and said that the conditions existing would not be permitted in a partnership, and that, if they were partners, a receiver would unquestionably be granted. We then decided the case upon the theory of partnership as it was announced by this court in *Whipple v. Lee*, 46 Wash. 266, 89 Pac. 712, although that case is not cited in our opinion. If we had not applied the law of partnership a receiver would have been denied. At all times plaintiff Boothe has been fighting for no one but himself, and against no one but Linden. The interest of no third party is involved. Boothe now relies upon the rule allowing an attorney's fee to a minority stockholder in a corporation. He was allowed a receiver upon the theory of partnership. The relation of the parties is the same today as it was when that order was made, and we see no reason why our attitude toward this case should be changed to serve Boothe's interest or convenience. The rule is well stated in the syllabus to the case of *McCormick v. Elsea*, 107 Va. 472, 59 S. E. 411:

"Except in rare instances, the power of the court to require one party to contribute to the fees of the counsel of another party, must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, dis-

covers or creates a fund which enures to the common benefit of all; but the discretion vested in the court should never be exercised in a case where the interests of the party whose fund is sought to be charged, are antagonistic to the party for whose benefit the suit is prosecuted. The case in judgment belongs to the latter class, and fees were properly refused."

"It is only where one party is, under the principles of equity, entitled to proceed for the benefit of all who stand in a like situation with him, and consequently where the counsel whom he employs stands in a sense as representing all, that counsel are entitled to have their fees paid out of the common fund which they have recovered for the benefit of all." 5 Thompson, Commentaries on the Law of Corporations, p. 5586.

It has been held that a minority stockholder could not recover, even in a corporation case, where his interest is entirely personal. There must be some advantage to the corporation. *Ex parte Gray*, 157 Ala. 358, 47 South. 286, 131 Am. St. 62; 2 Cook, Stock and Stockholders, § 748.

In *Trustees v. Greenough*, 105 U. S. 527, the power of the court to allow compensation in the way of attorney's fees and costs out of a trust fund is learnedly discussed. The court found the interest of the complainant to be personal; that he was not suing for the benefit of the trust:

"He was a creditor, suing on behalf of himself and other creditors, for his and their own benefit and advantage. . . . We can find no authority whatever for any such charge by a person in his situation . . . It would present too great a temptation to parties to intermeddle in the management of valuable property funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time, and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support."

Boothe, being an equal partner with Linden in the concern, stands in the same relation to the concern as would a creditor or any other person whose interest is entirely per-

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sonal. As we read the record, it would be manifestly unfair to charge either Linden or the corporation with this \$5,000. The allowance of costs and attorney's fees is a matter of discretion with the court. In friendly suits where counsel renders a nonpartisan service, it may be that such fees should be allowed as a matter of right (*Patrick v. Patrick*, 71 N. J. Eq. 347, 63 Atl. 848); or where the court can say that they should be allowed by way of punishment. 30 Cyc. 750.

We admit the right of a court—it is sometimes a duty—to meet these costs and expenses out of a common or trust fund, but it is not a right or a duty to be arbitrarily exercised. It is rather to be exercised in sound judicial discretion, and in furtherance of equity and justice. Boothe has shown no right or equity over his adversary. As we read the record, he is no better than Linden. He has done nothing for the common good. If Linden has sought advantage, so has Boothe. We do not hold that either of them has been dishonest, but they have been selfish. Some of Linden's claims have been rejected as illegal and some of Boothe's claims are unreasonable and wholly unsupported by any competent evidence. If he did not turn his claims into money, it is because he did not have the opportunity. If he has gained anything, it has been his gain and he should pay for it.

The "others," who become, because of their relation to a common fund, a supporting element to the doctrine that a court may allow these fees, are lacking in this case.

"We have carefully considered the authorities cited under this point of the appellants. Most of them relate only to costs as such between party and party and whether to be imposed personally or upon the fund. These have no bearing upon the subject under discussion. From the opinions in others, or the language of text-books, expressions are culled to the effect that a fund in court must bear the expense of its administration; that costs in chancery depend upon conscience and the whole merits of a case; that counsel fees out of a common fund belonging to the parties to the

action may be allowed, and that the power of the court over funds in its hands to award costs to be paid out of the fund has often been recognized. . . . What is meant by these authorities is no more than this, that the control of the fund furnishes the opportunity and imposes the duty of recognizing every substantial equity and every existing right in making the distribution, and they leave still before us the inquiry, what right or equity in the petitioners could arm the court with power to transfer to them a portion of the fund beyond their normal share? If there is not such equity there is no such power, for the court does not sit as a bandit, dividing booty." *Matter of Attorney General v. North American Life Ins. Co.*, 91 N. Y. 57, 43 Am. Rep. 648.

We cannot, therefore, in conscience charge the corporation with Boothe's attorney's fees and costs without making a like allowance for Linden. Equity will be best served by charging each party with his own expenses, for, as hereinbefore said, this is not a controversy between a corporation and a stockholder, but between two men, acting as partisans and in their own behalf. The demerit of Boothe's claim in this behalf can be quickly illustrated. The allowance of \$5,000 was made in part to pay for the services of expert accountants. The accountant in charge was not appointed by the court so far as we can see, but in all things acted as the agent of Boothe. He was a witness at the trial and his partisanship was evident. He even assumed to construe the original contract between the parties when asked by the court to answer a question of bookkeeping.

"The question presented, therefore, is whether it [the allowance of fees] is proper, where an expert is employed and is acting for one of the parties, to charge the same against the losing party as a part of the costs of the action. If the services of an expert are necessary for the proper presentation and determination of the case, he should be appointed by and act under the direction of, the court. Where, as in this case, he is the employee of one of the parties, the temptation to act in the interest of such party must be apparent. . . . if either party sees proper to employ the services

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of an expert for his own benefit, the court should not require the opposite party to pay for the services thus rendered. *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. 754.

Counsel for appellant earnestly contends that, inasmuch as the record shows valuable services rendered by Linden between the time of Boothe's retirement and the appointment of the receiver, he should be entitled to recover the amount now claimed as his salary. Linden has credited himself on the books with \$400 a month, aggregating \$9,050. The trial judge followed our former opinion, 55 Wash. 167, 104 Pac. 207, as the law of the case, although he adhered to his former opinion that the agreement between Boothe and Linden, that each should draw \$125 a month, was in anticipation of dividends and it was not to be drawn as salary. Whether this holding was right or wrong is not now open to discussion. This court is inclined to hold to the doctrine called "the law of the case." In *Seattle v. Northern Pac. R. Co.*, 63 Wash. 129, 114 Pac. 1038, it is said:

"It is urged with great earnestness that the law of the case was not correctly announced upon the former hearing, and many authorities are cited which hold that the party who is primarily liable cannot stay out of a case and dictate what defenses shall be interposed. We are disposed, however, to treat the conclusion reached on the former hearing as the law of the case. We are aware that this rule is not an inflexible one and binding upon this court. It is, however, fair to the litigants and the trial court, conducive to orderly procedure, and withal sound judicial policy. We have so ruled in many cases."

In reaffirming the doctrine of that case, we do not understand that it is necessary to hold, as counsel insists, that we could not, in a case involving a disputed fact, hold to a rule different from a former pronouncement, where there was additional evidence or a showing that a mistake of fact had been made. In this case, the right of Linden to draw a salary of \$125 a month and no more was determined by this court upon disputed evidence and in the light of the original contract.

Nothing further is urged in his behalf except that he has rendered exceptional service in selling coal. This may be admitted. Linden is bound by that rule which prevents a partner from claiming compensation from a partnership in the absence of an agreement therefor. This rule rests upon sound reason. It is the duty of partners to devote their whole time to carrying on the business of the firm. 22 Am. & Eng. Ency. Law (2d ed.), 121. In the same text it will be seen that a partner is not entitled to compensation because he is more active in the business or performs greater or more valuable service than his copartner. "Each partner is taking care of his own, and the law never undertakes to settle between partners their various and unequal services in relation to the joint concern." 22 Am. & Eng. Ency. Law (2d ed.), 121-123; 30 Cyc. 448; where the authorities from almost every state in the Union are collected. There are some exceptions to these rules, but the testimony does not bring Linden within any of them. Considering the relation of the parties to the corporation at the time the contract was made, the fact that each of them was to draw a like amount would indicate that neither of them should have a right to claim for the reasonable value of his services. They would have shared equally in the end for the contract was made in good temper and in keeping with their then present intentions. The net earnings of the company would have been paid in dividends.

All other items considered by the court have been carefully reviewed by us. They involve questions of fact only. We find nothing in the record that would warrant us in further disturbing the findings of the court.

The case will be remanded with instructions to modify the decree to the extent indicated in this opinion. Linden will recover his costs in this court. The parties will pay their own costs in the court below.

CROW, C. J., MOUNT, GOSE, and PARKER, JJ., concur.

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[No. 10628. *En Banc*. April 11, 1913.]

COLISEUM INVESTMENT COMPANY, *Respondent*, v. KING
COUNTY *et al.*, *Appellants*.¹

ACTIONS—FORM—LEGAL OR EQUITABLE—RELIEF. In an action for a conversion, commenced as an equitable proceeding, relief at law will not be denied because of the form of the pleadings.

COUNTIES—LIABILITY FOR CONVERSION—DEFENSES. In an action for the conversion by a county of improvements on leased property, which were to be appraised and paid for, it is immaterial whether the county commissioners declined to arbitrate, or whether they had not the power, since the county was liable for the value of the property converted in any event.

LANDLORD AND TENANT—IMPROVEMENTS BY TENANT—COMPENSATION—CONVERSION. Under a lease of county property giving the tenant a right to remove improvements if the lease is terminated on 60 days' notice, and providing for a two years renewal if the property be not required for immediate use by the county, in which case the improvements were to be appraised by arbitrators and paid for at the appraised value, the tenant is entitled, upon holding over during the two-year renewal period without notice of termination having been given, to recover the appraised value of the improvements at that time, converted by the county upon refusing to arbitrate the appraisal or to allow the improvements to be removed.

SAME—IMPROVEMENTS BY TENANT—COMPENSATION—CONVERSION—MEASURE OF DAMAGES. Where a lease provided that improvements by the tenant should be appraised and paid for, and the landlord converted the same at the termination of the lease, and thereafter leased the same and collected rents, the measure of damages is the value of the improvements for rental purposes at the termination of the lease, and the use to which they were put may be considered; but it is error to give judgment for the rents collected.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 30, 1912, upon findings in favor of the plaintiff, in an action for rents collected and equitable relief. Reversed.

John F. Murphy and *Robert H. Evans*, for appellants.

Kerr & McCord and *Maurice D. Leehey*, for respondent.

¹Reported in 131 Pac. 245.

CHADWICK, J.—On the 2d day of April, 1906, the county of King leased to one George B. Lamping, in consideration of the sum of \$500, payable in advance, certain property owned by it, to wit, lots 1, 4, 5 and 8, in block 33, of C. D. Boren's addition to the city of Seattle, for a term of two years from and after the first day of April, 1906. The lease provided:

“It is further mutually agreed and understood by the parties hereto that if, at the end of the said period of two years, the use of said premises shall not be required for immediate use by the said party of the first part for county purposes, the said party of the second part is to have the option and right of renewing or extending said lease on the same terms until such time as said premises shall be required for immediate use by said party of the first part for such county purposes: *Provided*, however, that said renewal or extension shall in no event extend beyond the 1st day of April, 1911. *Provided*, however, that if this lease shall have been extended so as to continue to the first day of April, 1911, and the party of the first part should determine to further lease said premises, and does not lease to the party of the second part, then the party of the second part, or his heirs, assigns, executors, or administrators, in consideration of the improvements that may have been placed on said premises, shall have the right to have said improvements appraised by three disinterested appraisers, one to be selected by each of the parties hereto, and the two so selected to choose a third, the party of the first part, shall thereupon be required to immediately pay to the party of the second part, value of said improvements as appraised. Said appraisalment to be conclusive and binding upon parties hereto. *Provided* that, if at any time subsequent to said first day of April, 1908, said premises should be required for immediate use by the party of the first part for county purposes, the board of county commissioners shall have the right and power, by first giving sixty days' notice of its intention to do so, to fully terminate and end said lease at any time so designated by such notice, and when said lease has been terminated in the way herein mentioned, the party of the second part shall, within sixty days thereafter, remove all buildings, structures, property and debris of every character placed thereon by him, and, if not

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so removed within the time aforesaid, the same shall be forfeited to the said party of the first part."

Lamping entered into possession of the property, and shortly thereafter assigned his interest in the lease to the Coliseum Investment Company. That company made valuable improvements, and beginning with October, 1906, enjoyed a large rent return, the gross figures being \$2,350 per month. No notice was given by the county of its intention to cancel the lease at the end of the second year period mentioned therein, and the investment company held over until the 30th day of March, 1911, when, without giving it any opportunity to remove its buildings, the county served notice upon it that its lease was terminated, and also served notice upon all its tenants that they must thereafter attorn to the county. The notice given to the investment company was in the form of a resolution adopted on the 29th day of March, 1911, and is in form as follows:

"Whereas, the lease made by King county on the 2nd day of April, 1906, with George B. Lamping, to lots 1, 4, 5, and 8, in block 33, C. D. Boren's Addition to the city of Seattle, expires by limitation on April 1, 1911; and whereas, the board has considered the proposition of again leasing said premises, and has concluded that the best interests of the county do not justify the further leasing of said property; now therefore, be it resolved; that the board of county commissioners express at this time its intention not to again lease said property, and that notice of the intention of the board be given to the assignees of said George B. Lamping, lessee. Dated this 29th day of March, 1911.

Attest:

Otto A. Case, Clerk,
By N. M. Wardall, Deputy.

David McKinzie,
M. L. Hamilton,
A. L. Rutherford."

Mr. Lamping, who was a witness at the trial and who was interested in the Coliseum Investment Company, testified that he called upon the commissioners prior to the 1st day of April, 1911, endeavoring to ascertain their then intentions, and to have an appraisal of the buildings if they were not going to continue the lease. This is denied by the commis-

sioners, but it is not denied that at some time, probably in the month of April, a request for an arbitration and appraisal was made. At about the same time, the commissioners were informed that the Coliseum Investment Company intended to remove the buildings and were informed by the commissioners, who in all things have acted under the advice of the prosecuting attorney's office, that the county did not admit the ownership of the buildings to be in the Coliseum Investment Company and would, if any attempt was made to remove the buildings, have the sheriff stop the work. The county has since that time leased the buildings and has collected approximately \$30,000 in rents. This action was brought by the Coliseum Investment Company, alleging the facts as we have briefly detailed them, and grounding their action upon an allegation that the county intended to convert the improvements to its own use and to continue leasing the property to the tenants of the investment company indefinitely. It asks that the county and its officers be restrained from interfering with the plaintiff in the removal of the buildings, that a receiver be appointed, and that a judgment be rendered for the amount of rents collected during the time the buildings have been detained and used by the county. A trial was had and the court concluded as a matter of law that the plaintiff was entitled to remain in the possession of the premises and to collect the rents until the value of the buildings could be fixed by a board of arbitration, and the amount so fixed paid to the investment company. The court further concluded that the county had no legal right or claim to the improvements as of date April 1, 1911. A decree was accordingly entered requiring the county, after reserving \$500 per month rent, to pay over the balance of all rentals collected by it to the investment company. The case is brought here on the appeal of the county.

It is first contended that plaintiff has no standing in equity. While the suit has been prosecuted as an equitable proceeding, the decree of the court is in effect a judgment at law, and it

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would serve no end to turn the respondent out of court when the right of the case can be determined and without doing violence to either party. The case is, after all, one of conversion, and if this court can direct a judgment at law, it will not deny relief because of the form of the pleadings. This is not denied by counsel. It is said in their brief:

“Plaintiff could have brought suit to recover compensation for said building; in other words, by trial of said action in a court before a jury. The plaintiff would receive the same measure of compensation that would have been granted at the hands of a board of appraisers, or at least the right of compensation would have been fully protected.”

Counsel insists, however, that the board of county commissioners had no authority to delegate away the discretionary power and duty which the law imposes on them by the appointment of a board of appraisers to determine the reasonable market value of the buildings. As we view the case, it is unnecessary to pass upon this question. People may, either in their own behalf or as representatives, agree to arbitrate; if they do not, the law will provide a remedy. In our judgment, it is immaterial whether the county commissioners have declined to arbitrate or whether they have not the power. It is enough that they have refused, and having refused, the respondent is entitled to pursue the usual remedy; that is, a suit for the value of its property.

The only question left in this case is whether the lease expired on April 1, 1911, and carried with it all the right and interest of the respondent in the buildings. The appellants admit that “respondent could have been compelled under the terms of the lease to have removed the buildings at any time between the 2d day of April, 1908, and the 1st day of April, 1911, had the county by proper notice required such action to be taken.” The commissioners, who were witnesses, testified very frankly that, for a long time prior to the 1st day of April, they had intended to terminate the lease and take over the buildings. Simple justice would demand, if this

case was one between individuals, that the notice referred to in the quotation just made should have been given. We know of no rule that will exempt the county from the exercise of good faith in its dealings. It might allow the lease to expire without a notice, but it is bound by its contract. It is provided:

“That if the lease shall have been extended so as to continue to the 1st day of April, 1911, and the party of the first part shall determine to further lease said premises, and does not lease to the party of the second part, then the party of the second part or his heirs, assigns, etc. in consideration of improvements that may have been placed on said premises, shall have the right to have said improvements appraised,” etc.

It is clear that it was not intended by anybody when the contract was drawn that the county should take over the buildings without compensation or opportunity to remove them. The parties were dealing at that time in good faith one with the other, and it was intended that Mr. Lamping and his successors would be entitled, (1) to a certain lease until April 1, 1908; (2) a possible lease until April 1, 1911, with the right of removal of the buildings if the county desired the immediate use of the property for county purposes; (3) the value of the buildings in the event of a continued leasing. The spirit of the contract is that, unless the property is required for immediate county use and is leased to any one other than the respondent, the county will pay for that which it takes. In the light of the contract, the county cannot be heard to say that it did not take possession of the property with the intention of leasing it, for it is leasing it. Respondent is entitled to compensation for the buildings which the county has converted. Appellants cite many cases holding that the right of removal must be exercised while the tenant is in possession, and insist that the possession of the buildings was voluntarily surrendered. We do not so read the record. It is true that the respondent obeyed the order of the county commissioners. They did not proceed to demolish the

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buildings when told that they would be stopped by the strong arm of the law. The time has passed when a man's legal rights are to be based upon a show of violence. There is a growing tendency on the part of the courts to put no penalty upon gentlemanly conduct. *Northern Pac. R. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909.

Neither is there any merit in the contention of appellants that the respondent's measure of damages depends, not upon the right of removal of the improvements, but upon the right to the possession of the premises. The cases cited to sustain this proposition are not in point, for the reason that it is competent for parties to contract a measure of damages, and they have done so in this case.

The judgment of the court is erroneous in so far as it directs the commissioners to pay over the rents collected to the respondent. The measure of damages is the value of the buildings as of date April 1, 1911. In considering such value, it is proper to take into consideration the use to which the buildings had been put and are being put, the time they have been used, and the time they may be used in the future.

Inasmuch as the county has refused to arbitrate, either wilfully or because it has not the power, the case will be remanded with instructions to the lower court to direct the framing of an issue, and to call a jury to determine the value of the buildings, not for wreckage purposes, as suggested by counsel for appellants, but in view of the uses to which the county has put the property. That this issue may be more clearly presented, the pleadings may be amended.

Reversed, with instructions to proceed as directed in this opinion. The parties will pay their own costs on appeal.

All concur.

[No. 10778. Department One. April 12, 1913.]

T. D. ROCKWELL, as *Executor etc.*, Appellant, v. J. W. EDGCOMB, Respondent.¹

VENDOR AND PURCHASER — OPTION—ASSIGNMENT—ASSUMPTION OF PAYMENTS—LIABILITY TO VENDOR—PRINCIPAL AND AGENT. An assignment of an option for the purchase of a mine, whereby the assignee agreed to make all the payments called for, does not render the assignee unconditionally liable to the vendor for the payments, where the same were all optional, the option was assignable on its face, and was obtained by the assignor as the agent and for the benefit of the assignee; since the vendor's rights are measured by the terms of the option agreement.

Appeal from a judgment of the superior court for King county, John S. Jurey, Esq., judge *pro tempore*, entered May 22, 1912, dismissing an action on contract, after a trial to the court. Affirmed.

James Kiefer, for appellant.

Tucker & Hyland (Wm. C. Keith, of counsel), for respondent.

MOUNT, J.—This action was brought by Barnett E. Barinds in his lifetime to recover from defendant upon a contract for the purchase of certain mining claims. The plaintiff died while the litigation was pending, and the executor of his estate was substituted as a party plaintiff. When the case was tried, a judgment of dismissal was entered. The plaintiff has appealed.

It appears from the record that Mr. Barinds acquired the claim to the mines in question in the summer of 1909. The defendant thereafter desired to obtain an option to purchase these mining claims. He was unable to deal directly with Mr. Barinds, and thereupon authorized one J. A. Hall to act for him and to secure an option from Mr. Barinds. The result

¹Reported in 131 Pac. 191.

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was that Mr. Hall in his own name, on December 20, 1909, entered into a written contract with Mr. Barinds as follows:

"This agreement, made this 20th day of December, 1909, between Barnett E. Barinds, of Seattle, Washington, party of the first part, and J. A. Hall, of the same place, party of the second part, Witnesseth: That the said party of the first part, for and in consideration of the payment of five thousand dollars this day paid, the receipt whereof is hereby acknowledged, does hereby covenant and agree to and with the party of the second part, that he will make, execute and deliver to the said First National Bank of Seattle in escrow, a conveyance of all of his rights, title and interest in and to an undivided one-third interest in the two quartz mining claims known as 'Jumbo' and 'Ben Bolt' located July 3, 1905, and recorded July 11, 1905, at the Stewart Sub-mining Recording office at Stewart, British Columbia, situated at the head of the South Fork of Glacier Creek about one and one-half miles from the mouth of which is known as Skeena Mining District in the Province of British Columbia; said deed to be a quit claim deed, and to be held by the First National Bank of Seattle, Washington, in escrow and to be delivered to the said J. A. Hall, or his assigns, upon the payment at the option of said J. A. Hall, or his assigns, of the further sum of five thousand dollars, six months from the date hereof, and the further sum of ten thousand dollars on or before one year from the date hereof. It is agreed between the parties hereto that if default be made in the payment of either the five thousand dollars deferred payment due on or before six months from date, or the ten thousand dollars due on or before one year from the date hereof, that then and in that event the sum this day paid shall be forfeited to the party of the first part as liquidated damages, and the party of the second part and his assigns shall forfeit all interest in or right to buy or purchase said interest in said claims, and the said deed shall be returned by the First National Bank of Seattle to the party of the first part. The said J. A. Hall and his assigns assume the burden and expenses of the litigation now pending in the supreme court of British Columbia respecting said interest in said claims, and in the superior court of King county, state of Washington, respecting said interest in said claims, wherein Barnett E. Barinds is plaintiff and George E. Green is defendant, so far as expenses hereinafter incurred are concerned.

In witness whereof the said parties have hereunto set their hands in triplicate the day and year in this instrument first above written.

Barnett E. Barinds,
"J. A. Hall."

Mr. Edgcomb furnished the \$5,000 which was paid upon the contract. Four days later, Mr. Hall, in order to protect himself, entered into the following written agreement with Mr. Edgcomb:

"This agreement made this 24th day of December, 1909, between J. A. Hall of Seattle, Washington, the party of the first part, and J. W. Edgcomb of the same place, party of the second part, witnesseth: That the said party of the first part in consideration of the sum of \$5,000 and of the covenants hereinafter contained on the part of the party of the second part, has sold, assigned, and transferred, and by these presents does assign, sell, transfer and set over unto said party of the second part and to his heirs and assigns, the annexed option agreement made December 20th, 1909, between Barnett E. Barinds of Seattle, Washington, and the said party of the first part, and all the rights and privileges of the party of the first part under and by virtue of said agreement dated December 20th, 1909. And the said party of the second part, in consideration of the transfer of said agreement, does hereby covenant, promise and agree to and with the said party of the first part that he, the said J. W. Edgcomb, party of the second part, will make the payments of \$5,000 and \$10,000 due respectively in six months and one year from December 20th, 1909, and will pay said sums to said Barnett E. Barinds on the days and times above mentioned and pay and discharge all expenses incurred by or on behalf of Barnett E. Barinds or J. A. Hall in litigation over the interest agreed to be conveyed by Barinds by said option agreement of December 20th, 1909, between said Barinds and one George E. Green in the courts of the state of Washington or the Province of British Columbia, Canada. Witness the hands of the parties.

J. A. Hall,
"J. W. Edgcomb."

Thereafter, when the second payment of \$5,000 became due, it was paid by Mr. Edgcomb. Before these contracts were entered into, litigation was pending in the courts of

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British Columbia involving the rights of Mr. Barinds to any interest in the mining claims. After the second payment on the optional contract had been paid, it was determined by the litigation above referred to that Mr. Barinds had no interest in the mining claims. Thereafter Mr. Edgcomb refused to make the last payment of \$10,000 named in the contract. This action was brought to collect the same, together with \$1,092.53 expenses incurred in the litigation.

It is argued by the appellant that, by the terms of the contract of December 24 by which Hall assigned his interest in the contract of December 20 to Mr. Edgcomb, Mr. Edgcomb unconditionally agreed to make the deferred payments to Mr. Barinds; and that Mr. Barinds consented to the assignment by Hall to Edgcomb upon that condition, and therefore the optional contract became a binding, enforceable obligation as between Edgcomb and Barinds. It is conceded upon the record that Hall was the agent of Edgcomb, and also that the contract dated December 20 is an optional contract as it appears to be upon its face. This contract was acquired by Hall as agent for Edgcomb. It was, as between Hall and Edgcomb, the contract of the latter, and was so treated because Edgcomb made the payments. The rights of Barinds were measured by the terms of that contract. If payments were not made as agreed, he was at liberty to rescind and retain the payments made. If payments were made, he was bound to convey. The contract by its terms was assignable, and whether assigned or not, its terms control. Hall or his assigns were bound to make the payments in order to obtain a deed. The consent of Barinds was not necessary in order to make a valid assignment from Hall to Edgcomb. The contract of December 24, 1909, was a contract between Mr. Hall and his principal, Mr. Edgcomb. Mr. Barinds was not a party to that contract. It simply assigned to Edgcomb the contract of December 20 between Hall and Barinds, and required Edgcomb to make the payments specified in the former contract which Hall was required to make. It did not require

anything in addition, but was merely a written agreement on the part of Hall to do what in law he was required to do and on the part of Edgcomb to hold Hall harmless. No new contract was made with Barinds by the execution and delivery of the contract between Hall and Edgcomb.

The appellant argues that this transaction is like one where a purchaser takes a tract of land incumbered by a mortgage and assumes and agrees to pay the mortgage indebtedness; he is liable therefor, and the mortgagee may maintain a personal action upon the covenant of assumption; citing *Solicitors Loan & Trust Co. v. Robins*, 14 Wash. 507, 45 Pac. 89. Conceding this to be the rule in that kind of a case, it fails in this, because here Mr. Edgcomb assumed only the liability upon the optional contract between Hall and Barinds. There is no obligation to pay; that is to say, he was not bound to make further payments. He could make them or not as he chose. If he did not pay, he could not obtain the deeds or recover payments already made. Nor could Barinds enforce further payments, as is attempted in this case. The written contract between the parties controls this case, and we therefore do not notice other contentions which attempt to vary the terms of the written contract, or that Hall had a secret interest in the mines undisclosed to his principal. All the deferred payments, including the expenses of the litigation, were optional under the terms of the contract.

The judgment is therefore affirmed.

CROW, C. J., PARKER, GOSE, and CHADWICK, JJ., concur.

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[No. 10934. Department Two. February 28, 1913.]

LILLIAN MOORE, Respondent, v. K. MIYANAGA et al., Appellants.¹

Appeal from a judgment of the superior court for King county, Everett Smith, J., entered November 9, 1912, upon findings in favor of the plaintiff, in an action for injuries sustained in a fall through a trapdoor in a store, after a trial to the court. Affirmed.

Walter A. Keene, for appellants.

Daniel Landon and *J. G. Raley*, for respondent.

PER CURIAM.—This is an action for personal injuries. The cause was tried to the court without a jury, and findings of fact were made as follows:

“(1) That the defendants, K. Miyanaga, S. Takahashi and K. Nakanishi, are now and at all times herein mentioned were partners doing business under the firm name and style of Rose Grocery Co.

“(2) That on or about the 15th day of March, 1912, the plaintiff was injured in the store of the defendants at 1000 Howell St., in the city of Seattle, Washington, through the negligent and careless acts of the defendants and their servants and agents in maintaining and leaving open an unguarded trapdoor in the floor of said store, thereby causing the plaintiff to fall through said open space, through no negligence or carelessness on her part, and sprain her left ankle and strain and injure the ligaments therein; that said injury caused as aforesaid caused the plaintiff much physical and mental pain and suffering and was a severe shock to her nervous system.

“(3) That on account of the injuries received as aforesaid plaintiff has been obliged to expend the sum of \$15 for doctor's bills and has been further damaged on account of the physical pain and suffering and mental anguish caused by the injuries aforesaid amounting in all, including the physicians' services, to the sum of seventy-five (\$75) dollars.”

Motion for a new trial being made and overruled, judgment was entered in favor of the plaintiff. The defendants appeal.

From a reading of the transcript of the evidence as contained in the statement of facts, we are unable to say that the findings of the superior court are not sustained by the weight of the testimony.

The judgment will therefore be affirmed.

¹Reported in 131 Pac. 1199.

[No. 11025. Department One. April 5, 1913.]

BURROUGHS ADDING MACHINE COMPANY, *Appellant*, v. T. F. WILCOX,
*Receiver etc., Respondent.*¹

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered August 6, 1912, dismissing an action of replevin, after a trial upon stipulated facts before the court without a jury. Affirmed.

O. M. Nelson, for appellant.

B. G. Cheney and *Hayden & Langhorne*, for respondent.

PER CURIAM.—This case, although brought by a different party plaintiff, involves the same question as *Casey-Hedges Co. v. Wilcox*, ante p. 605, 131 Pac. 205, and upon the authority of that case the judgment is affirmed.

¹Reported in 131 Pac. 206.

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- Services, see WORK AND LABOR.

1. **ACTIONS—FORM—LEGAL OR EQUITABLE—RELIEF.** In an action for a conversion, commenced as an equitable proceeding, relief at law will not be denied because of the form of the pleadings. *Coliseum Investment Co. v. King County*..... 687
2. **ACTIONS—PREMATURE ACTIONS—COMMUNITY PROPERTY — DIVORCE.** An action by a wife to recover an interest in community real estate not disposed of by a decree of divorce, rendered in California at the suit of the husband, is premature, where the decree was "interlocutory," reciting that the husband has established grounds for the dissolution of the marriage bonds, and that upon the expiration of one year, final judgment granting a decree of divorce be entered, which time had not elapsed when the wife's action was commenced. *Keeler v. Parks*..... 255

ADJOINING LANDOWNERS:

See **BOUNDARIES**.

ADJUDICATION:

Operation and effect of former adjudication, see **JUDGMENT**, 2-5.

ADMINISTRATION:

Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**.

ADMISSIONS:

Judicial notice of admissions on former appeal, see **APPEAL AND ERROR**, 16.

Of counsel as to gaseous condition of mine, see **MINES AND MINERALS**, 2.

ADOPTION:

Of new city charter, effect on officers continued in office, see **MUNICIPAL CORPORATIONS**, 3.

ADVERSE POSSESSION:

As against remaindermen, see **LIFE ESTATES**.

AFFIDAVITS:

As part of record on appeal, see **APPEAL AND ERROR**, 12, 13.

As to creditors, on purchase of goods in bulk, see **FRAUDULENT CONVEYANCES**.

AGREEMENT:

See **CONTRACTS**.

AGRICULTURE:

Irrigation, see **WATERS AND WATER COURSES**, 4-8.

ALLOWANCE:

Of attorney's fees and disbursements in action by stockholder, see **CORPORATIONS**, 8.

Of counsel fees in divorce case, see **DIVORCE**.

Of attorney's fees on appeal from decision of industrial insurance department, see **MASTER AND SERVANT**, 2.

ALTERATION:

Of petition for public improvement, see **MUNICIPAL CORPORATIONS**, 6.

AMENDMENT:

Of articles of incorporation, see **CORPORATIONS**, 2.

Of ordinance prescribing assessment district for improvement, see **MUNICIPAL CORPORATIONS**, 8, 9.

Of pleading, see **PLEADING**, 1, 2, 5.

ANIMALS:

Placing diseased animal on premises of another as trespass, see **TRESPASS**.

1. **ANIMALS—DAMAGES—PLACING DISEASED ANIMALS ON PREMISES OF ANOTHER—KNOWLEDGE OF OWNER.** The owner of a horse affected with glanders is not liable for damages resulting from placing the animal in the barn of another, by permission, the public authorities afterwards destroying the barn, where notice that the horse was diseased could not be imputed to him. *Farrar v. Peterson & Co.* 482

ANNULMENT:

Of marriage, see **MARRIAGE**.

APPEAL AND ERROR:

Review in criminal prosecutions, see **CRIMINAL LAW**, 10-12.

Review of judgment in contest of local option election, see **INTOXICATING LIQUORS**, 2, 3.

Fixing attorney's fees on appeal from decision of industrial insurance department, see **MASTER AND SERVANT**, 2.

To civil service commission on wrongful removal from office, see **MUNICIPAL CORPORATIONS**, 5.

Assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 15.

Proceedings creating joint school district, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.

Review of decision of school directors discharging teacher, see **SCHOOLS AND SCHOOL DISTRICTS**, 4.

Appealability of decision upon submitting matter to judge, see **STIPULATIONS**.

III. DECISIONS REVIEWABLE.

1. **APPEAL—DECISIONS REVIEWABLE—INTERLOCUTORY JUDGMENT—FINAL ORDERS.** No appeal lies from an order adjudging a defendant in default for want of an answer, nor from an interlocutory order requiring the defendant to specifically perform the contract in suit and pay plaintiff the balance due on the contract within thirty days, and providing that, in the event that such order be not obeyed, the property shall be decreed to be sold to discharge a lien therefor, where no appeal was taken from such final decree entered thirty days later; since they are not final orders nor within Rem. & Bal. Code, § 1716, authorizing appeals from certain specified orders. *Borell v. Carson*..... 117
2. **APPEAL—DECISIONS REVIEWABLE—COSTS—RETAXATION.** An order refusing to retax costs is not appealable. *White v. Stout*..... 62
28—72 WASH.

APPEAL AND ERROR—CONTINUED.

IV. RIGHT TO APPEAL.

3. **APPEAL—RIGHT OF APPEAL—PARTIES—ATTORNEY AND CLIENT—COMPENSATION.** An order of the superior court fixing attorney's fees, pursuant to a stipulation between attorney and client that the court should fix the compensation, is appealable by the attorneys, under Rem. & Bal. Code, § 1716, subds. 1 and 6, allowing appeals by any party aggrieved by the decision. *Jones v. Jones*..... 517
4. **APPEAL—RIGHT TO APPEAL—WAIVER—CESSATION OF CONTROVERSY.** The giving of a recognizance bond for the payment of the support of a minor child, upon a conviction of neglecting to support, is not such an acquiescence in the judgment as to operate as a cessation of the controversy or a waiver of the right of appeal. *State v. Coolidge* 42
5. **APPEAL—REVIEW—CESSATION OF CONTROVERSY—REHEARING.** Where a case is settled pending appeal, by a waiver of appellant's right to administer an estate, it is the duty of the respondent to call the fact to the attention of the court; and after decision filed, the respondent cannot, on petition for a rehearing, ask a modification of the judgment on account of the waiver. *Buchser v. Buchser*... 675

V. PRESERVATION AND RESERVATION IN LOWER COURT.

6. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS.** Exceptions to instructions specifying the paragraphs by number are sufficient. *Hofreiter v. Schwabland*..... 314
7. **APPEAL—REVIEW—EXCEPTIONS TO INSTRUCTIONS.** Exceptions to instructions, merely filed with the clerk and not called to the attention of the trial judge, cannot be considered on appeal, especially where no motion for a new trial was made. *State v. McBride*.. 390

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

8. **APPEAL—NOTICE OF APPEAL—PARTIES ENTITLED TO NOTICE—NECESSARY PARTIES.** Upon appeal from a judgment disallowing a claim against an insolvent, and directing a sale of assets, the principal creditor instituting the receivership proceedings, and a party to the action, is a necessary party to the appeal; as is, also, the purchaser at the receiver's sale; and where notice of appeal was not served on them, the appeal must be dismissed. *Raymond Co. v. Little Falls Fire Clay Co.*..... 209

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

9. **APPEAL—SUPERSEDEAS—RIGHT TO.** Supersedeas is not a matter of right pending an appeal from an order directing the county commissioners to appoint a road supervisor from a list of names furnished by a good roads association, pursuant to Rem. & Bal. Code,

APPEAL AND ERROR—CONTINUED.

§ 5578, there being no right to a supersedeas in matters of public interest unless the parties can be kept *in statu quo*, or the damages compensated in money. *State ex rel. Board of County Commissioners v. Superior Court*..... 478

X. RECORD.

10. APPEAL—REVIEW—RECORD. Objection to costs cannot be urged on appeal, where the record fails to show what disposition, if any, was made of a motion to retax costs. *State v. Miller*..... 174

11. APPEAL—RECORD—MOTION AND ORDERS. The denial of a motion for a change of venue will not be reviewed on appeal, where neither the motion nor order is brought up in the record and the sufficiency of the application ascertained from anything in the record. *Kelley v. Sakai* 364

12. APPEAL—RECORD—AFFIDAVITS. Error in recalling the jury and giving additional instructions cannot be shown by affidavits, nor reviewed in the absence of a bill of exceptions or statement of facts. *State v. Rice*..... 104

13. APPEAL—RECORD—AFFIDAVITS. The supreme court cannot consider affidavits, filed long after judgment, and not made a part of the bill of exceptions or statement of facts. *Kelley v. Sakai*..... 364

14. APPEAL—RECORD—WRITTEN INSTRUCTIONS. Instructions wholly in writing are part of the record on appeal, without being incorporated in the bill of exceptions or statement of facts. *Hofreiter v. Schwabland* 314

15. APPEAL—RECORD—QUESTIONS PRESENTED—PRESUMPTIONS. Upon an appeal in a mechanics' lien case, in which the lower court failed to find that the party to whom the material was furnished sustained any such relation to the owner of the property as would enable him to bind the property, under Rem. & Bal. Code, § 1129, and failed to find a compliance with § 1134, prescribing the contents of the notice of lien, and concluded that the plaintiff was not entitled to a lien, it must be presumed, in the absence of the evidence, that the court had sufficient reason to decline to make such findings. *Canal Lumber Co. v. Kong Yick Investment Co.*..... 437

16. APPEAL—REVIEW—RECORD—QUESTIONS PRESENTED—JUDICIAL NOTICE OF FORMER ADMISSIONS. The supreme court is governed by the record on appeal in each case, and on a second appeal after retrial, cannot, in aid of the findings, take judicial notice of admissions made on the former appeal. *Canal Lumber Co. v. Kong Yick Investment Co.* 437

XI. BRIEFS.

17. APPEAL—BRIEFS—FAILURE TO FILE—DISMISSAL. Prejudice will be presumed, and an appeal dismissed, where there has been a delay

APPEAL AND ERROR—CONTINUED.

of more than fifteen months in filing briefs. *Levold v. Stirrat*. 28

XVI. REVIEW.

18. **APPEAL—REVIEW—PRESUMPTIONS.** It will be presumed that a trial on the merits was on the issues made by the pleadings. *Peterson v. Smith*..... 284
19. **APPEAL—REVIEW—BURDEN OF SHOWING ERROR.** Where the evidence is not brought up on appeal, the presumption is that it supports the judgment, and it is incumbent on the appellant to show that the conclusions of law and judgment do not follow the findings of fact. *Canal Lumber Co. v. Kong Yick Investment Co.*... 437
20. **APPEAL AND ERROR—HARMLESS ERROR—NOT AFFECTING APPELLANT.** In an action for damages by reason of negligence, against two joint tortfeasors, jointly and severally liable, error in granting a nonsuit as to one is not error of which the other can complain. *Metz v. Postal Telegraph Cable Co.*..... 188
21. **APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** Error in instructions is harmless where the court should have taken the case from the jury and directed a verdict against the appellant. *Nilsson v. Martinson* 286
22. **APPEAL—REVIEW—HARMLESS ERROR.** The granting of a nonsuit upon erroneous grounds will be sustained if the decision was correct upon any ground. *Pearson v. Willapa Construction Co.*... 487
23. **APPEAL—JUDGMENT—CONCLUSIVENESS.** Where an appeal, brought up on a short record, was affirmed, judgment entered as directed cannot be attacked by appellant on motion to vacate upon a showing of facts which appellant failed to present to the supreme court on the former appeal. *Architectural Decorating Co. v. Nicklason* 415
24. **APPEAL—DECISION—"LAW OF THE CASE."** Where the supreme court has decided, upon disputed evidence, the right of an officer of a corporation to draw a salary, the decision is the law of the case governing a retrial upon substantially the same evidence. *Boothe v. Summit Coal Mining Co.*..... 679

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

25. **APPEAL—DECISION—RECALL OF REMITTITUR — GROUNDS — JURISDICTION.** The supreme court loses jurisdiction of the cause when the remittitur goes down, and cannot recall the remittitur except for the purpose of correcting a mistake or enforcing its judgment. *Peabody v. Edmonds*..... 604
26. **SAME—DECISION—RECALL OF REMITTITUR—DELAY.** A motion filed March 6th, 1913, to recall a remittitur sent down on July 3d, 1912, will be denied for want of due diligence. *Peabody v. Edmonds*. 604

APPLIANCES:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 10.

APPLICATION:

Issuance of final injunction on *ex parte* application, see INJUNCTION.

APPOINTMENT:

Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 1.

APPORTIONMENT:

Of assets and obligations on creation of new county, see COUNTIES, 1-3.

Of assessments for public improvements, see MUNICIPAL CORPORATIONS, 16.

APPRAISEMENT:

Of homestead claim on execution sale, see EXECUTION, 2.

APPROPRIATION:

Of water rights in public lands, see WATERS AND WATER COURSES, 1.

ARBITRATION:

See STIPULATIONS.

ARGUMENT OF COUNSEL:

In civil actions, see TRIAL, 3.

In criminal prosecution, see CRIMINAL LAW, 6.

ARTICLES:

Of incorporation, amendment changing residence, see CORPORATIONS, 2.

ASSAULT:

1. ASSAULT—AGGRAVATED ASSAULT—EVIDENCE—MATERIALITY. In a prosecution for aggravated assault, inflicted to avenge a grievance of the accused's brother, to which the accused was not a witness and had only second-hand information, it is proper to exclude evidence of the altercation with prosecuting witness constituting the brother's grievance, as the same is immaterial. *State v. Davis*..... 261
2. ASSAULT—AGGRAVATED ASSAULT—EVIDENCE—SUFFICIENCY. A conviction for second degree assault upon conflicting evidence is sustained, where there was testimony to the effect that the accused made a sudden assault with a shoe knife to avenge a grievance of his younger brother, while the prosecuting witness was unarmed and at a disadvantage. *State v. Davis*..... 261
3. SAME—ELEMENTS OF OFFENSE—GRIEVOUS BODILY HARM—QUESTION FOR JURY. Under the statute making the inflicting of grievous bodily harm upon another an essential element of assault in the second degree, the question is one of fact for the jury and not of law for the court, and it is error for the court to determine the same in its instructions. *State v. Davis*..... 261

ASSESSMENT:

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 7, 8, 15, 16.

Of tax, see **TAXATION**, 1, 2.

ASSETS:

Apportionment of on creation of new county, see **COUNTIES**, 1-3.

ASSIGNMENTS:

Transfer of cause of action ground for abatement, see **ABATEMENT AND REVIVAL**, 2.

Assignment of contract by corporation, see **CORPORATIONS**, 10.

Estoppel by conduct to question, see **ESTOPPEL**, 2.

Leases, see **LANDLORD AND TENANT**, 1.

Set-off against assigned claim, see **SET-OFF AND COUNTERCLAIM**.

Liability of assignee for payments called for in option agreement, see **VENDOR AND PURCHASER**, 3.

1. **ASSIGNMENTS—CONTRACTS ASSIGNABLE.** A contract whereby a fruit preserving company sold to a wholesaler for future delivery a specified number of cases of jelly and jam subject to approval, and guaranteed under the pure food laws, is assignable, where it specified no particular manufacturer, brand or label. *King v. West Coast Grocery Co.*..... 132
2. **ASSIGNMENTS—VALIDITY.** An assignment of a contract valid as between the parties is sufficient to pass the title to the property, as against the other party to the contract. *King v. West Coast Grocery Co.* 132
3. **ASSIGNMENTS—TITLE—WHEN PASSES — RECEIVERS — RIGHT TO ACCOUNT ASSIGNED PRIOR TO APPOINTMENT.** Where a sale of pig iron was made to a manufacturer of iron posts, holding a contract with a city for posts, on the security of an assignment by the manufacturer of its claims against the city, which assignment was accepted by the city, title to the city warrant in payment of the posts passed to the seller of the iron; and a receiver of the manufacturer would not be entitled to the warrant by reason of the fact that part of the posts were delivered by him, or that an insignificant part of the work thereon was performed after his appointment as receiver; as the receiver would have no better title than the assignor of the warrant. *McGill v. Brown*..... 514

ASSUMPTION:

Of facts in charge to jury, see **CARRIERS**, 4.

Of risk by employee, see **MASTER AND SERVANT**, 8, 16-20.

By assignee, of payments called for in option agreement, see **VENDOR AND PURCHASER**, 3.

ATTORNEY AND CLIENT:

Right of attorney to appeal from order fixing compensation, see **APPEAL AND ERROR**, 3.

Attorney's fees in action by stockholder, see **CORPORATIONS**, 8.

Argument and conduct of counsel at trial in criminal prosecutions, see **CRIMINAL LAW**, 6.

Allowance of counsel fees in divorce proceedings, see **DIVORCE**.

Fees of attorney on appeal from decision of industrial insurance department, see **MASTER AND SERVANT**, 2.

Admissions by counsel during trial, see **MINES AND MINERALS**, 2.

Conduct of counsel ground for new trial, see **NEW TRIAL**, 1.

Argument and conduct of counsel at trial in civil action, see **TRIAL**, 3.

1. **ATTORNEY AND CLIENT—EMPLOYMENT OF ASSOCIATE—AUTHORITY—RATIFICATION.** A client ratifies the employment by her attorney of associate counsel, where she knew he was actively engaged in the case, and stipulated that the court might fix his compensation. *Jones v. Jones*..... 517

2. **ATTORNEY AND CLIENT—EMPLOYMENT—CONTRACTS—RETAINER FEE.** Where a contract for the employment of attorneys provided that \$1,000 be paid as a retainer fee, out of which the attorneys were to pay all expenses of the case, and that at the end of the litigation, they should be paid the reasonable value of their services, no part of the retainer need be returned where other attorneys were substituted before the end of the litigation. *Schmidt v. Ourtiss*.... 211

3. **ATTORNEY AND CLIENT—CONTRACT FOR COMPENSATION—FRAUD OF ATTORNEY—EVIDENCE—ISSUES AND INSTRUCTIONS.** In an action to recover money paid to an attorney as a fee for defending plaintiff, on the ground of misrepresentations as to the seriousness of the charge, it is error to try the case on the theory that the plaintiff could recover all or no part of the money paid, where it appears that the attorney was not discharged, but performed various services, securing the plaintiff's release on bail, argued a demurrer, investigated the facts, secured a separate trial, and sat through the trial of the other defendants, whereupon plaintiff was discharged; since the issues to be presented are, was the plaintiff overreached; and if so, what was the reasonable value of the services performed. *Johnson v. Mann* 651

ATTORNMMENT:

See **LANDLORD AND TENANT**, 1.

AUTHORITY:

Of attorney, see **ATTORNEY AND CLIENT**, 1.

AUTOMOBILES:

Collision with pedestrian, see **MASTER AND SERVANT**, 3.

Injuries from collision with, see **MUNICIPAL CORPORATIONS**, 17-19.

Collision with street car, see **STREET RAILROADS**, 5.

BALLOTS:

See **ELECTIONS**.

BANKRUPTCY:

Recovery by trustee of money paid by company for capital stock, see **CORPORATIONS**, 4-6.

Capacity of temporary receiver to sue, see **RECEIVERS**, 3.

BAR:

Pendency of another action ground for abatement, see **ABATEMENT AND REVIVAL**, 1.

Of action by former adjudication, see **JUDGMENT**, 2-5; **MORTGAGES**, 4.

Of action by limitation, see **LIMITATION OF ACTIONS**.

BIAS:

Of juror, see **JURY**.

BILL OF EXCEPTIONS:

As part of record on appeal, see **APPEAL AND ERROR**, 12-14.

BILLS AND NOTES:

Notes in aid of illegal transaction, see **INTOXICATING LIQUORS**, 4.

Personal judgment on note as bar to foreclosure of mortgage lien, see **MORTGAGES**, 4.

1. **BILLS AND NOTES—NEGOTIABILITY—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, §3392, subd. 4, providing that a note to be negotiable "must be payable to order or to bearer," and Id., § 3401, providing that it need not follow the language of the act, but any terms are sufficient which clearly indicate an intent to conform to the requirements thereof, a mortgage note simply made payable to B. (the mortgagee) without the words "order or bearer" or words of similar import, is not negotiable; notwithstanding provisions in certain contingencies respecting the mortgagee or his "assigns;" since these relate to the mortgage and indicate only that the mortgage may be transferred by assignment. *Quast v. Ruggles*.... 609

BONDS:

Municipal bond election, see **ELECTIONS**.

Indemnity bonds, see **INDEMNITY**.

For restitution, in unlawful detainer action, see **LANDLORD AND TENANT**, 7-9.

Contractor's bonds, see **MUNICIPAL CORPORATIONS**, 10.

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 26.

BOUNDARIES:

1. **BOUNDARIES—ESTABLISHMENT—DESCRIPTION IN DEEDS — EVIDENCE — SUFFICIENCY.** Where a grantee in a deed platted the land and actually surveyed and staked the addition upon the ground conforming substantially to the description in his deed, such description must be taken as fixing the boundaries of the tract, notwithstanding that there appears of record a subsequent deed, between the same parties, purporting to be given to correct the description in the first deed, and fixing the west boundary of the tract thirty-five feet east of the boundary first fixed and platted on the ground, where it does not appear that the grantee ever accepted the second deed or caused it to be recorded and had no remembrance of it; nor is such conclusion overcome by the fact that the description in the paper plat conformed more nearly to the description in the second deed than to that in the first deed, the plat omitting reference to a granite monument controlling the description in the deeds. *Scheuerman Investment Co. v. Land Owners Corporation*..... 613

BREACH:

- Damages for breach of contract, see **DAMAGES**, 1.
- Of contract to renew policy, see **INSURANCE**.
- Of lease by landlord, see **LANDLORD AND TENANT**, 6.
- Of warranty as defense in action for price, see **SALES**, 1.
- Of contract for sale of land, see **VENDOR AND PURCHASER**, 2.

BRIDGES:

1. **BRIDGES—INJURIES—DUTY TO REPAIR — MUNICIPAL CORPORATIONS—STREETS.** A city owes the duty to keep its bridge in a reasonably safe condition for travel, and is liable to a traveler who is injured without neglect on her part by reason of an unsafe condition of which the city, in the exercise of reasonable care, had, or ought to have had, knowledge. *Zolawenski v. Aberdeen*..... 95

BRIEFS:

- On appeal, see **APPEAL AND ERROR**, 17.

BROKERS:

- Oral contract for commissions, see **FRAUDS, STATUTE OF**, 2.
1. **BROKERS—COMMISSIONS — CONTRACT FOR EMPLOYMENT — PERFORMANCE.** A broker is entitled to recover his commissions, the value of shares agreed to be given him, for finding a purchaser for 3,000 shares of stock in a corporation to be organized by the defendant, where he fully performed his agreement by finding a purchaser willing to buy the stock, but the project fell through solely because of defendant's misrepresentations as to the commissions he would make out of the enterprise, and as to the number of subscribers necessary to form the syndicate, and the value of the land. *Smith v. Adelberg* 434

BROKERS—CONTINUED.**2. BROKERS — ACTION FOR COMMISSIONS — EVIDENCE — SUFFICIENCY.**

Where brokers did not have an exclusive contract, they cannot recover commissions, in the absence of proof that the purchaser was produced by them or that the sale was the result of their efforts.

Parker v. Bruggemann..... 309

BUILDING CONTRACTS:

See **CONTRACTS**, 3-7.

BUILDINGS:

Negligence in method of tearing down building, see **MASTER AND SERVANT**, 10.

Conversion of house, see **TROVER AND CONVERSION**.

BULK STOCK LAWS:

Sale of stock in bulk, see **FRAUDULENT CONVEYANCES**.

BUNCO GAME:

Larceny by trick or bunco game, see **LARCENY**, 1.

BURDEN OF PROOF:

To show superior title, see **EJECTMENT**.

BURGLARY:

1. **BURGLARY—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to sustain a conviction of burglary, notwithstanding a confession of the accused's younger brother that he alone was the guilty party, where it appears that the accused occupied adjoining rooms and had the opportunity, the stolen goods were found in apartments occupied by himself and brother, he made no denial of guilt at the time of his arrest, and had knowledge of the presence of the stolen goods for about a week before his arrest, and made no disclosure thereof. *State v. Hanlon*..... 333

CANCELLATION OF INSTRUMENTS:

Rescission of release on ground of fraud, see **COMPROMISE AND SETTLEMENT**.

Rescission of sale of corporate stock for fraud, see **CORPORATIONS**, 8.

Rescission of contract, see **SALES**, 1.

CARRIERS:

1. **CARRIERS—WHO ARE PASSENGERS.** One who boards a street car stopping at a usual stopping place, intending to pay her fare, is a passenger until she safely alights therefrom, although the car was on the way to the barn and she was notified to get off. *McIlhenny v. Tacoma R. & Power Co.*..... 184
2. **CARRIERS—INJURIES TO PASSENGERS—SUDDEN JERKS AND JABS.** Evidence that a passenger on a mixed freight train was thrown to the

CARRIERS—CONTINUED.

- floor by a sudden jolt is insufficient to sustain a recovery for the injuries sustained in the fall, where there was no evidence that there was anything unusual or more than the ordinary jerking or jolting necessarily incident to the operation of freight trains; since negligence cannot be inferred therefrom. *Wile v. Northern Pac. R. Co.* 82
3. SAME—PRESUMPTIONS. The rule of *res ipsa loquitur* has no application to a case in which a passenger on a freight train was thrown to the floor by a sudden jolt in the operation of the train. *Wile v. Northern Pac. R. Co.*..... 82
4. CARRIERS—INJURY TO PASSENGERS — ACTIONS — INSTRUCTIONS—ASSUMPTION OF FACTS. An instruction to the effect that, if the jury find that a passenger was notified that a car was going to the barn and passengers would not be carried, it was the duty of the passenger to get off and of the company "to keep the car standing still," is not an unlawful comment on the facts in that it assumes that the car was standing, a disputed question in issue, where the instructions, construed as a whole, merely meant that it was the duty to keep the car motionless while the passenger was getting off. *McIlwaine v. Tacoma R. & Power Co.*..... 184
5. SAME—INSTRUCTIONS—DUTY OF PASSENGER. An instruction that it was the duty of a passenger to "immediately alight" upon being informed that the car did not carry passengers and was going to the barn, is not erroneous in that it was her duty to wait until the car stopped. *McIlwaine v. Tacoma R. & Power Co.*..... 184
6. CARRIERS—PASSENGER ELEVATORS—NEGLIGENT CONSTRUCTION—COMMON USE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in the construction of a well and cage for an automatic elevator in an apartment house, intended to be used principally by women and children without any attendant, notwithstanding it was such as was commonly used in like buildings, where it appears that the floors projected into the well without any gate, door, or protection inside the cage, which could have been easily installed, and that a child fell when the elevator started, falling with its head projecting over the unprotected edge of the cage, where it was caught and crushed by the next floor projecting into the elevator well. *Atkeson v. Jackson Estate*..... 233
7. SAME—CONTRIBUTORY NEGLIGENCE OF PASSENGER OPERATING ELEVATOR—EVIDENCE—SUFFICIENCY. In such a case, the mother of a child two years old is not guilty of contributory negligence in attempting to use the elevator with her children, where she entered the elevator with another infant in a baby buggy, carrying a number of packages, her experience with elevators had been limited, and she testified that she did not realize the danger of such an accident. *Atkeson v. Jackson Estate*..... 233

CARRIERS—CONTINUED.

8. **SAME—PROXIMATE CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY.**
In such a case, recovery is not precluded by the fact that she testified she did not know what caused the child to fall, since falls by children of tender years should have been anticipated, and the failure to guard against the same was the proximate cause. *Atkeson v. Jackson Estate*..... 233
9. **CARRIERS—INJURY TO PASSENGERS—EVIDENCE—RELEVANCY.** Upon an issue as to the amount of damages sustained by a passenger in a head-on railway collision, a photograph of the wrecked train is competent to show the result of the impact. *Taylor v. Spokane, Portland & Seattle R. Co.*..... 378

CERTIFICATE:

Certifying testimony used on former trial, see **EVIDENCE**, 6.

CERTIORARI:

Review of local option election contests, see **INTOXICATING LIQUORS**, 2.

CESSATION OF CONTROVERSY:

On appeal, see **APPEAL AND ERROR**, 4, 5.

CHALLENGE:

To juror for bias, see **JURY**.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 4-6, 8, 9.
To jury in civil actions, see **TRIAL**, 6-10.

CHARTER:

Of municipal corporation, see **MUNICIPAL CORPORATIONS**, 1-3.
Restrictions on grant of franchise as in conflict with state law, see **STREET RAILROADS**, 2.

CHATTEL MORTGAGES:

As prior incumbrance over unrecorded bill of sale, see **SALES**, 2.

CHECKS:

Forgery of, see **FORGERY**.

CHILD:

Nonsupport, see **PARENT AND CHILD**.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CIVIL RIGHTS:

Infringement of, see **MARRIAGE**.

CIVIL SERVICE:

See MUNICIPAL CORPORATIONS, 2, 3.

CLAIMS:

To property levied on, see EXECUTION.

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS.

Against community estate, see HUSBAND AND WIFE, 9.

Set-off against assigned claim, see SET-OFF AND COUNTERCLAIM.

COLLATERAL ATTACK:

On judgment, see JUDGMENT, 3.

COLLISION:

Between railway trains, see CARRIERS, 9.

Between automobile and pedestrian, see MASTER AND SERVANT, 3.

Between automobile and person in city street, see MUNICIPAL CORPORATIONS, 17-19.

Between automobile and street car, see STREET RAILROADS, 5.

COMMENT:

On facts by court, see CRIMINAL LAW, 4-6.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

1. **COMMERCE—EMPLOYERS' LIABILITY—INJURY TO SERVANTS EMPLOYED IN INTERSTATE COMMERCE—STATUTES—CONSTRUCTION.** Since the first Federal employers' liability act, 34 Stats. at L, p. 232, was held unconstitutional for want of power in congress to legislate with reference to the liability of common carriers to employees not engaged in interstate commerce, the second employers' liability act, 35 Stats. at L, p. 65, providing that common carriers engaged in interstate commerce shall be liable to "any person suffering injury while he is employed by such carrier in such commerce," must be construed as intended to include every person who could be so included within the purview of the constitutional power. *Horton v. Oregon-Washington R. & Nav. Co.*..... 503
2. **SAME—LIABILITY TO SERVANTS EMPLOYED IN INTERSTATE COMMERCE—WHO ARE.** One employed to operate a pumping plant for the purpose of supplying water to locomotives used indiscriminately by a railroad company in interstate and intrastate commerce, is within the purview of the second Federal employers' liability act, rendering the company liable to "any person suffering injury while he is employed by such carrier in such commerce," and such pumper was so employed at the time of his death, where he was at the time going to his work on a "speeder" over the company's tracks. *Horton v. Oregon-Washington R. & Nav. Co.*..... 503

COMMISSIONERS:

Determining classification of county for purpose of fixing salary of officers, see COUNTIES, 4, 5.

COMMISSIONS:

Of broker, see BROKERS.

Oral contract for broker's commissions, see FRAUDS, STATUTE OF, 2.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY DEBT:

See HUSBAND AND WIFE, 9, 10.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 9.

Premature action to recover interest in, see ACTION, 2.

Administration of by husband, see EXECUTORS AND ADMINISTRATORS, 1.

COMPENSATION:

Appeal from order fixing attorney's fees, see APPEAL AND ERROR, 3.

Of attorney, see ATTORNEY AND CLIENT.

Of broker, see BROKERS.

Allowance of fees and disbursements in action by stockholders, see CORPORATIONS, 8.

Of county officers, see COUNTIES, 4, 5.

Of attorney in divorce proceedings, see DIVORCE.

For property taken or damaged for public use, see EMINENT DOMAIN, 2-5.

For improvements by tenant, see LANDLORD AND TENANT, 2, 3.

Of attorney on appeal from decision of industrial insurance department, see MASTER AND SERVANT, 2.

Of wrongfully removed officer, see MUNICIPAL CORPORATIONS, 4.

Of partners, see PARTNERSHIP, 2.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 4.

Of jurors, see JURY.

Of witnesses in general, see WITNESSES.

COMPLAINT:

In criminal prosecutions, see INDICTMENT AND INFORMATION.

In civil actions, see PLEADING.

COMPROMISE AND SETTLEMENT:

See ACCORD AND SATISFACTION.

1. COMPROMISE AND SETTLEMENT — RESCISSION — FRAUD—EVIDENCE—SUFFICIENCY. A settlement cannot be avoided on the ground of fraud in representing that the injuries sustained were temporary and could be cured, where it appears that plaintiff, who was seriously injured about his legs and feet, after several interviews made a settlement and signed a release in consideration of \$430, and made no complaint or attempt to rescind until more than two years thereafter, and it was not shown that he was not in his right mind or did not read the release, or that the representations were not honest expressions of opinion. *Nath v. Oregon R. & Nav. Co.*..... 664

CONCLUSION:

Of witness, see EVIDENCE, 4.

CONCLUSIVENESS:

Of judgment on appeal, see APPEAL AND ERROR, 23.

Of order of county board fixing classification of county, see COUNTIES, 4.

Of judgment, see JUDGMENT, 2-5 .

Of official acceptance of performance of contract for public work, see MUNICIPAL CORPORATIONS, 11.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

See SALES.

CONDITIONS:

Precedent to action by corporation, see CORPORATIONS, 11-13.

Precedent to action on policy, waiver, see INSURANCE, 2.

Precedent to rescission of optional sale contract, see MINES AND MINERALS, 5.

CONDUCT:

Of counsel at criminal trial, see CRIMINAL LAW, 7.

Estoppel by, see ESTOPPEL, 2.

Of counsel ground for new trial, see NEW TRIAL, 1.

Of counsel in trial of civil action, see TRIAL, 3.

CONFIRMATION:

Of sale on execution, see EXECUTION.

CONFLICT OF LAWS:

Criminal and civil liability for nonsupport of minor child, see PARENT AND CHILD, 2.

Grant of franchise to street railroad, see STREET RAILROADS, 1, 2.

CONSIDERATION:

For oral agreement, see **FRAUDS, STATUTE OF**, 1.

For assignment of lease, see **LANDLORD AND TENANT**, 1.

CONSTITUTIONAL LAW:

Infringement of personal rights, see **MARRIAGE**.

Limitation of municipal indebtedness, see **MUNICIPAL CORPORATIONS**, 24-26.

Subjects and titles of statutes, see **STATUTES**, 1.

1. **CONSTITUTIONAL LAW—DUE PROCESS—INTOXICATING LIQUORS—REGULATIONS.** Rem. & Bal. Code, § 6282, prohibiting any manufacturer from advancing money to pay or become surety for the payment of any retail liquor license, does not deprive the manufacturers of property without due process of law, regulation of the liquor traffic being within the power of the state. *Lewer v. Cornelius*..... 124

CONSTRUCTION:

Of statute giving right to contest will, see **ABATEMENT AND REVIVAL**, 2.

Of statute defining negotiable note, see **BILLS AND NOTES**.

Negligent construction of passenger elevator, see **CARRIERS**, 6, 7.

Of Federal employers' liability act, see **COMMERCE**, 1.

Of contracts, see **CONTRACTS**, 3-7.

Of statute providing for speedy trial of accused, see **CRIMINAL LAW**, 1.

Of statute providing for payments to dependents of deceased workman, see **MASTER AND SERVANT**, 1, 2.

Of contract to construct building for tenant, see **LANDLORD AND TENANT**, 4.

Of statute requiring use of safety lamps in coal mines, see **MINES AND MINERALS**, 1.

Of optional sale contract, see **MINES AND MINERALS**, 4.

Of ordinance fixing speed limit for automobiles, see **MUNICIPAL CORPORATIONS**, 17.

Of statute relating to proceedings for creation of joint school district, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.

Of statutes authorizing counterclaim or set-off, see **SET-OFF AND COUNTERCLAIM**.

Of penal statutes, see **STATUTES**, 2.

Of stipulation, see **STIPULATIONS**.

Of contract for sale of real property, see **VENDOR AND PURCHASER**, 1.

CONSTRUCTIVE TRUSTS:

See **TRUSTS**.

CONTEST:

- Survival of right to contest will, see ABATEMENT AND REVIVAL, 2.
- Unpresented claims, see EXECUTORS AND ADMINISTRATORS, 7.
- Of local option election, see INTOXICATING LIQUORS, 2, 3.

CONTINUANCE:

- In criminal prosecution, see CRIMINAL LAW, 3.

CONTRACTORS:

- Materials furnished to independent contractor, sufficiency of evidence, see MECHANICS' LIENS, 1.
- Bond to secure performance of contract, see MUNICIPAL CORPORATIONS, 10.
- Negligence in grading street, see MUNICIPAL CORPORATIONS, 12.
- Liability for damage to property by public improvement, see MUNICIPAL CORPORATIONS, 14.

CONTRACTS:

- See ACCORD AND SATISFACTION; BILLS AND NOTES; COMPROMISE AND SETTLEMENT; CORPORATIONS, 9, 10; INDEMNITY; INSURANCE; MINES AND MINERALS; MONEY LENT; SALES; WORK AND LABOR.
 - Assignment, see ASSIGNMENTS.
 - Of employment, see ATTORNEY AND CLIENT.
 - Employment of broker, see BROKERS.
 - Damages for breach, see DAMAGES, 1.
 - Agreements within statute of frauds, see FRAUDS, STATUTE OF.
 - For payment of retail liquor license contrary to law, see INTOXICATING LIQUORS, 4.
 - Leases, see LANDLORD AND TENANT.
 - Construction of building contract, see LANDLORD AND TENANT, 4.
 - For public improvements, see MUNICIPAL CORPORATIONS, 11.
 - Reformation, see REFORMATION OF INSTRUMENTS.
 - Specific performance, see SPECIFIC PERFORMANCE.
 - Stipulation in actions, see STIPULATIONS.
 - Sales of realty, see VENDOR AND PURCHASER.
1. **CONTRACTS—VALIDITY—PUBLIC POLICY—ENFORCEMENT—OBJECTIONS**
How RAISED. The court will refuse to enforce a contract entered into in violation of a statute and against public policy, without regard to the manner in which the illegality is disclosed, and will start an inquiry of its own regardless of the technical accuracy of the pleadings or the admissibility of evidence disclosing the illegality, to the end that neither party be given any aid in illegal proceedings. *Lewer v. Cornelius*..... 124
 2. **CONTRACTS—VALIDITY—RESTRAINT OF TRADE.** An agreement by the seller of a plant for the manufacture of laundry trays, cement blocks and concrete products, not to reenter in such business in the states of Washington and Oregon for a period of five years, is not void as

CONTRACTS—CONTINUED.

in restraint of trade, upon its face, since the covenant may have been reasonably necessary to the success of the business. *Washington Charcrete Co. v. Campbell*..... 566

3. **CONTRACTS—CONSTRUCTION—ARCHITECT'S CONTRACT—PAROL EVIDENCE TO EXPLAIN WRITING.** A contract employing an architect to prepare plans for a courthouse on a percentage basis in the event of the building going ahead at some future time, and for the payment of \$1,000 in case the contract for the "building" should not be let, is plain and unambiguous, and the county is not liable in excess of \$1,000 if a building is not erected on the plans prepared; hence parol evidence is inadmissible to explain the contract. *Gauntt v. Ohehalis County*..... 106
4. **SAME—EVIDENCE—MATERIALITY.** In such a case, evidence that the county had not abandoned its purpose to construct a courthouse is immaterial. *Gauntt v. Ohehalis County*..... 106
5. **CONTRACTS—BUILDING CONTRACTS—SPECIFICATIONS—CONSTRUCTION.** Specifications of a contract for plumbing, requiring best quality "galvanized wrought iron or mild steel" pipe, confer an option upon the contractor to use either "galvanized wrought iron" or "mild steel." *Northwestern Marble & Tile Co. v. Megrath*..... 441
6. **CONTRACTS—CONSTRUCTION—POWERS OF SUPERVISING ARCHITECT.** The supervising architect for the construction of a Federal building, under a contract making his decision as to the proper interpretation of the specifications final and conclusive, has no power to require the use of "galvanized wrought iron" pipe, where the contract plainly gave the contractor the option to use "mild steel" pipe. *Northwestern Marble & Tile Co. v. Megrath*..... 441
7. **CONTRACTS—BUILDING CONTRACTS—CONSTRUCTION—EXTRINSIC AID.** A contract for the construction of a courthouse which provided that the contractor should furnish all the materials "except the heating and electric work," construed in connection with the specifications, made a part of the contract, which provided that he shall furnish all rough hardware and "shall allow \$500, for the purchase of 'finishing hardware'" to be selected by the architect, requires the contractor to furnish and pay for finishing hardware to the amount of \$500; and no extrinsic aid in construing the contract is needed. *Pacific Hardware Co. v. Olsen*..... 569

CONTRIBUTORY NEGLIGENCE:

Of passenger, see **CARRIERS**, 7.

Of servant, see **MASTER AND SERVANT**, 19, 21-24.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 19.

Of person injured by street railroad, see **STREET RAILROADS**, 4, 5.

CONVERSION:

- Legal or equitable relief, see ACTION, 1.
- Liability of county for, see COUNTIES, 6.
- Of improvements by landlord, see LANDLORD AND TENANT, 2, 3.
- Wrongful conversion of personal property, see TROVER AND CONVERSION.

CONVEYANCES:

- See ASSIGNMENTS; MINES AND MINERALS; MORTGAGES.
- In fraud of creditors, see FRAUDULENT CONVEYANCES.
- In trust, see TRUSTS.
- Contracts to convey, see VENDOR AND PURCHASER.

COPIES:

- Of writings as evidence, see EVIDENCE, 2.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.

1. CORPORATIONS — RESIDENCE — SALES — CONDITIONAL SALES BY CORPORATION—FILING—COUNTY OF RESIDENCE. Under Rem. & Bal. Code, § 3679, providing that the articles of incorporation of a company shall contain the name of the city and county in which the principal place of business is to be located, the "residence" of the corporation is at such place, within the meaning of Id., § 3670, requiring conditional sales of personal property to be filed in the auditor's office of the county wherein the vendee "resides" at the date of taking possession of the property; hence a filing in another county where the company had a mill and where the property was situated is not notice to creditors of the vendee; especially in view of the further section, Id., § 3708½, requiring corporations to fix their principal place of business, which must be held to be their residence. *First Nat. Bank v. Wilcox*..... 473
2. SAME—AMENDING ARTICLES—CHANGING PRINCIPAL PLACE OF BUSINESS. The filing of articles of incorporation in such other county where the mill and property was located, is not an amendment of the articles changing the residence of the corporation to such county, where the articles filed stated that the principal place of business was in the county originally fixed in the articles; especially in view of Rem. & Bal. Code, § 3679, providing the method of amending articles and § 3708½, providing for the filing of a certificate thereof, in case it is desired to remove the principal place of business to another county. *First Nat. Bank v. Wilcox*..... 473
3. CORPORATIONS—RESIDENCE—CONDITIONAL SALES BY CORPORATION—FILING—COUNTY OF RESIDENCE. The principal place of business of a corporation designated as required by law in its articles of incorporation must be held to be its "residence," within Rem. & Bal.

CORPORATIONS—CONTINUED.

Code, § 3670, requiring conditional sales contracts to be filed with the auditor of the county wherein the vendee resides. *Casey-Hedges Co. v. Wilcox*..... 605

4. CORPORATIONS — CAPITAL STOCK — UNLAWFUL REDUCTION—BANKRUPTCY—ACTION BY TRUSTEE. A trustee in bankruptcy of an insolvent corporation may recover money paid out by the corporation in the purchase of its stock, if any creditor was injured thereby, whether the corporation was solvent or not at the time of the transaction. *Union Trust and Sav. Bank v. Amery*..... 648
5. CORPORATIONS—CAPITAL STOCK—REDUCTION IN FRAUD OF CREDITORS—ACTION TO RECOVER—INSTRUCTIONS. In an action by a creditor of an insolvent corporation to recover money unlawfully paid by the company for its capital stock, it is error to instruct the jury that if defendant sold the stock to the company and knew he was selling it to the company he would be liable, otherwise not; since his knowledge or good or bad faith was immaterial in case the corporation paid out money for its capital stock to the prejudice of creditors. *Union Trust and Sav. Bank v. Amery*..... 648
6. SAME—QUESTION FOR JURY. In such a case, the plaintiff is not entitled to a directed verdict, where there was a question of fact for the jury as to whether the stock was sold to and paid for by another instead of the corporation. *Union Trust and Sav. Bank v. Amery* 648
7. CORPORATIONS—STOCK—SALE—RESCISSION FOR FRAUD—EVIDENCE—SUFFICIENCY. The purchaser of stock in a drug corporation, upon the recommendation of the defendant, who was the undisclosed owner of the stock, cannot be rescinded for fraud, where it appears that no confidential relations existed between the parties, the purchaser was experienced in the business, made his own investigation of the stock and learned its value and the amount of the debts against it, and purchased with full knowledge thereof; and did not promptly offer to rescind when he learned of the vendor's interest in the stock. *Harris v. Stewart*..... 661
8. CORPORATIONS—ACTIONS BY STOCKHOLDERS—FOR BENEFIT OF CORPORATION. In an action by a stockholder on behalf of himself and others similarly situated, in which there is a favorable termination, the benefit of which goes to the corporation, plaintiff is entitled to recover a reasonable attorney's fee and necessary disbursements, but such allowance will not be made to a stockholder owning half of the stock, in a controversy with the owner of the other half, in which a receiver was appointed on the theory of a partnership, and no one but the plaintiff was benefited by the result of the suit. *Boothe v. Summit Coal Mining Co.*..... 679
9. CORPORATIONS—CONTRACTS — EXECUTION—VALIDITY — EVIDENCE—SUFFICIENCY. There is a *prima facie* valid execution of a lease by a corporation to its president, where it was signed by the president

CORPORATIONS—CONTINUED.

- and secretary and also the other trustees, and attested by the corporate seal, and there was evidence that it was authorized by the trustees, although no record thereof was made. *King v. West Coast Grocery Co.* 132
10. **SAME** The assignment of a contract by a corporation is sufficiently shown where it appears that it was signed by the secretary, who was authorized to make it, and that it and a lease were parts of the same transaction, and there was *prima facie* evidence of the valid execution of the lease; especially where the lease and contract were acquiesced in by the corporation, and hence valid as between the parties. *King v. West Coast Grocery Co.*..... 132
11. **CORPORATIONS—ACTIONS—CONDITIONS PRECEDENT—PAYMENT OF LICENSE FEE—PROOF.** Payment of the annual corporate license fee, which by statute is a prerequisite to suit by a corporation, may be proved by parol, notwithstanding the statutes make the certificate of the secretary of state *prima facie* evidence. *Eastman & Co. v. Watson* 522
12. **SAME.** Evidence that it had been paid for the current year is *prima facie* evidence that it had been paid for previous years. *Eastman & Co. v. Watson*..... 522
13. **SAME—PAYMENT OF LICENSE FEE—ISSUES, PROOF, AND VARIANCE.** Rem. & Bal. Code, § 3715, providing that no corporation shall commence or maintain any suit without alleging and proving that it had paid its annual license fee, is a license tax or revenue measure, and proof that the fee was paid prior to the trial although in default when the suit was commenced is admissible under an allegation that it had been paid before suit brought, without amendment of the complaint; since the purposes of the statute had been fully met. *Eastman & Co. v. Watson*..... 522

COSTS:

- Appealability of order refusing to retax costs, see **APPEAL AND ERROR**, 2.
- Review of objections to as dependent on record, see **APPEAL AND ERROR**, 10.
- Costs to stockholder in action by, see **CORPORATIONS**, 8.
- Condemnation proceedings, see **EMINENT DOMAIN**, 5.

1. **COSTS—PARTIES LIABLE—HUSBAND AND WIFE—JOINT LIABILITY.** In an action for reformation, the husband of the defendant in interest cannot object that costs were awarded against the defendants jointly, where he answered jointly with his wife and did not disclaim interest. *Lisle v. Quinlan*..... 493

CO-TENANCY:

- See **TENANCY IN COMMON**.

COUNCIL:

See MUNICIPAL CORPORATIONS, 1, 2.

COUNTERCLAIM:

See SET-OFF AND COUNTERCLAIM.

COUNTIES:

1. **COUNTIES—DIVISION—APPORTIONMENT OF ASSETS AND OBLIGATIONS.** In the absence of any statute, when a new county is created from territory of an old county, the latter retains all its assets and assumes all existing obligations. *Douglas County v. Grant County* 324
2. **SAME—POWERS OF LEGISLATURE.** The division of counties and apportionment of assets is solely a legislative function. *Douglas County v. Grant County*..... 324
3. **COUNTIES — DIVISION—INDEBTEDNESS — APPORTIONMENT ON FORMATION OF NEW COUNTY.** Upon the formation of a new county from territory of another county, under a special act complete in itself, requiring the new county to assume a certain proportion of the indebtedness of the old county but containing no provision as to the assets of the old county, the new county is not entitled to share in such assets; and the general statutes, Rem. & Bal. Code, §§ 3826, 3827, authorizing the two county auditors to agree upon the proportion of debts that the new county shall pay, have no application. *Douglas County v. Grant County*..... 324
4. **COUNTIES—COUNTY BOARD—SALARIES OF OFFICERS — DETERMINING CLASSIFICATION OF COUNTY—CONCLUSIVENESS.** The board of county commissioners acts in *quasi* judicial capacity in ascertaining by proof and determining the number of inhabitants in the county upon which the law fixes the salaries of county officers; and the order of the board, not questioned by appeal or writ of certiorari, is conclusive of the fact and of the proper classification of the county, and is a complete protection to a county officer in accepting the salary allowed him thereby. *Lewis County v. Montfort*..... 248
5. **COUNTIES—COUNTY OFFICERS—SALARIES—RECOVERY OF EXCESS SALARY.** The acceptance by a county officer of a smaller salary, after the court has set aside the action of county commissioners in determining the classification of the county, does not affect his right to retain the larger salary paid to him under the order of the board of county commissioners. *Lewis County v. Montfort*..... 248
6. **COUNTIES—LIABILITY FOR CONVERSION—DEFENSES.** In an action for the conversion by a county of improvements on leased property, which were to be appraised and paid for, it is immaterial whether the county commissioners declined to arbitrate, or whether they had not the power, since the county was liable for the value of the property converted in any event. *Coliseum Investment Co. v. King County* 687

COUNTY BOARD:

Classification of county for purpose of fixing salary of officers, see **COUNTIES**, 4, 5.

COURTS:

Review of decisions, see **APPEAL AND ERROR**.

Condemnation proceedings, see **EMINENT DOMAIN**.

Effect of issuance on *ex parte* application of order for parties litigant to meet, see **INJUNCTION**.

Final jurisdiction of local option election contests, see **INTOXICATING LIQUORS**, 2, 3.

Power to order meeting of parties for conference, in action for annulment of marriage, see **MARRIAGE**.

Allowance of attorney's fees on appeal from decision of industrial insurance department, see **MASTER AND SERVANT**, 2.

Review of assessment proceedings, see **MUNICIPAL CORPORATIONS**, 15.

Review of order of school board discharging teacher, see **SCHOOLS AND SCHOOL DISTRICTS**, 4.

Submission of matter to judge as court, see **STIPULATIONS**.

CREATION:

Of new counties, see **COUNTIES**, 1-3.

CREDITORS:

Notice to creditors to present claims, see **EXECUTORS AND ADMINISTRATORS**, 3-6.

Conveyances in fraud of, see **FRAUDULENT CONVEYANCES**.

CRIMINAL LAW:

See **ASSAULT**; **BURGLARY**; **FORGERY**; **LARCENY**.

Violation of fishing law, see **FISH**.

Nonsupport of wife, see **HUSBAND AND WIFE**, 1-7.

Indictment, information, or complaint, see **INDICTMENT AND INFORMATION**.

Prosecution of minor husband for nonsupport, see **INFANTS**.

Violation of liquor laws, see **INTOXICATING LIQUORS**, 1.

Nonsupport of minor child, see **PARENT AND CHILD**.

1. **CRIMINAL LAW—TRIAL—RIGHT TO SPEEDY TRIAL—STATUTES—CONSTRUCTION.** Rem. & Bal. Code, § 2312, providing for the dismissal of a criminal charge if the accused be not brought to trial within 60 days after the indictment found or information filed, is satisfied if his first trial is had within such time, and does not require that, after appeal and reversal of a judgment of conviction, a second trial shall be had within sixty days after the remittitur has gone down to the lower court. *State v. Miller*..... 154
2. **SAME—WAIVER OF RIGHT.** The right to a speedy trial, within Const., art. 1, § 22, and Rem. & Bal. Code, § 2312, providing for the

CRIMINAL LAW—CONTINUED.

dismissal of a criminal charge if the accused be not brought to trial within 60 days after indictment found or information filed, unless good cause is shown for the delay, is waived by failure to ask for a trial and acquiescence in the delay until the case has been set for trial upon the request of the state, where the state did not act arbitrarily and had a plausible excuse for the delay. *State v. Miller* 154

3. CRIMINAL LAW—TRIAL—CONTINUANCE—DISCRETION—NECESSITY OF SHOWING—SPEEDY TRIAL. It is discretionary with the trial court to grant a continuance, after a criminal case has been set for trial, on its appearing that a material witness for the state, whose name was indorsed on the information, is temporarily absent from the state; and the accused cannot complain that he was denied a speedy trial or that a showing was not made as to the issuance of a subpoena for the witness, and the substance of his evidence, where the accused was brought to trial within sixty days after the information was filed as required by Rem. & Bal. Code, § 2312. *State v. Grune* 448
4. CRIMINAL LAW—TRIAL—INSTRUCTIONS—COMMENT ON FACTS. In a criminal prosecution, a request to instruct that the evidence of detectives or police officers must be closely scrutinized and weighed with great care, owing to the nature of their business and the tendency to overdraw their testimony, is properly refused; as the same would have been unlawful comment upon the evidence in violation of Const., art. 4, § 16. *State v. Miller*..... 174
5. CRIMINAL LAW—TRIAL—INSTRUCTIONS—UNLAWFUL COMMENT. In a prosecution for forgery, an instruction that possession of a forged check raises a presumption of guilt, is not an unlawful comment on the evidence, so as to constitute fundamental error that could not be waived. *State v. McBride*..... 390
6. CRIMINAL LAW—TRIAL—INSTRUCTIONS—COMMENT ON FACTS. The statement of general rules governing the weight and credibility to be given to expert testimony, is not an unlawful comment on the evidence. *State v. Cherry Point Fish Co.*..... 420
7. CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. Error cannot be predicated on improper conduct of counsel for the state in disclosing a picture of the accused while an inmate of an eastern prison, where it does not appear that any of the jurors saw it or had any intimation of what it was. *State v. Cohen*..... 109
8. CRIMINAL LAW—TRIAL—INSTRUCTIONS—PRESUMPTIONS AS TO NATURAL AND PROBABLE CONSEQUENCES. The presumption that the accused intended the natural and probable consequences of his acts does not extend beyond the actual consequences; and where the wounded person recovered from an attack that was likely to produce death, it is error to instruct the jury that they could presume that

CRIMINAL LAW—CONTINUED.

the attack was made with intent to kill, if death was the usual and ordinary result of the defendant's voluntary acts. *State v. Davis* 261

9. **SAME—TRIAL—REQUESTED INSTRUCTIONS.** It is not error to refuse requested instructions that are covered in the general charge. *State v. Cherry Point Fish Co.*..... 420
10. **CRIMINAL LAW—APPEAL—RECORD—BILL OF EXCEPTIONS—STATEMENT OF FACTS.** A "bill of exceptions," upon appeal from a conviction of neglecting to support a minor child, is sufficient to raise questions that might have been presented by a "statement of facts." *State v. Coolidge.*..... 42
11. **CRIMINAL LAW—APPEAL—REVIEW.** The supreme court will not disturb a conviction that is sustained by substantial evidence, even if there is a preponderance of evidence against it. *State v. Cherry Point Fish Co.*..... 420
12. **CRIMINAL LAW—APPEAL—HARMLESS ERROR.** Statements of counsel in argument are not ground for reversal where they were not prejudicial. *State v. Cohen.*..... 109

CROSSINGS:

Accident at street crossing, see **STREET RAILROADS**, 5.

DAMAGES:

For placing diseased animal on premises of another, see **ANIMALS**.
Evidence on issue as to amount of, see **CARRIERS**, 9.

For wrongful death, see **DEATH**.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 2-5.

Evidence of mental shock in action for, see **EVIDENCE**, 1.

Wife's services as element of, see **HUSBAND AND WIFE**, 8.

Recovery of liquidated damages by landlord in action on bond, see **INDEMNITY**.

For failure to issue renewal policy, see **INSURANCE**.

Measure of for conversion of improvements by landlord, see **LANDLORD AND TENANT**, 3.

For breach of lease by landlord, see **LANDLORD AND TENANT**, 6.

In action on bond for restitution, given in unlawful detainer action, see **LANDLORD AND TENANT**, 9.

Injuries caused by public improvements, see **MUNICIPAL CORPORATIONS**, 13, 14.

From obstruction of sewer, see **MUNICIPAL CORPORATIONS**, 20-22.

From water escaping from city main, see **MUNICIPAL CORPORATIONS**, 23.

For malpractice, see **PHYSICIANS AND SURGEONS**, 2.

For conversion of property, see **TROVER AND CONVERSION**, 1.

1. **DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS—EVIDENCE—ADMISSIBILITY.** Upon breach of a contract to employ plaintiff to

DAMAGES—CONTINUED.

- log defendant's timber, the plaintiff may recover his prospective profits, to be ascertained by the best evidence obtainable, such as the estimates of qualified timber men, acquainted with local conditions, as to the cost of performing particular parts of the work, although the estimates do not furnish a measure of mathematical nicety. *Bogart v. Pitchless Lumber Co.*..... 417
2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$500 damages from a fall is supported by evidence that the plaintiff did ordinary housework prior to the injury, besides milking cows and caring for swine, and afterwards was completely incapacitated and suffered a prolapsus of the uterus. *Zolawenski v. Aberdeen.*..95
3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** Damages in the sum of \$3,250, for a painful cut of a thumb, lacerating the flesh, injuring the bone and resulting in a stiff thumb and partial loss of use, are excessive and should be reduced to \$1,000. *Mathis v. Western Furniture Mfg. Co.*..... 206
4. **DAMAGES—PERSONAL INJURIES—TOTAL DISABILITY—EXCESSIVE VERDICT.** A verdict for \$18,000 for personal injuries sustained by a strong, well, coal miner, 29 years of age, capable of earning \$4 per day, is not excessive, where he was rendered a cripple for life, with practically no earning power, his left leg was atrophied and partly paralyzed, he had little control of his urinary organs and suffers constant pain, with no hope of recovery. *Gennaux v. Northwestern Imp. Co.* 268
5. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$5,000 for personal injuries sustained by a logger, struck on the head by a log, is so excessive as to show passion and prejudice, and should be reduced to \$2,500, where it appears that plaintiff returned to his work in less than a month and continued therein for nearly a year at an increased wage, without any complaint for injury to his back or permanent disability, or any treatment except for a scalp wound; and in a written statement for membership in a lodge, he represented that he was well and sound. *Knutson v. Moe Brothers.*..290
6. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$1,500 for personal injuries, sustained by a pedestrian struck by an automobile, will not be held excessive, where one rib was broken, his back weakened, he was unable to work at his previous employment, suffering a loss of \$1.50 per day, and had sustained a loss of \$567 in wages. *Hammons v. Setzer.*..... 550
7. **DAMAGES—PERSONAL INJURIES—FUTURE DAMAGES—INSTRUCTIONS.** An instruction, in an action for personal injuries, that plaintiff was entitled to recover "further expense which may happen in the future by reason of the injuries received" is not prejudicially erroneous, where other instructions were given plainly telling the jury what results they could consider in that connection. *McIlwaine v. Tacoma R. & Power Co.* 184

DAMAGES—CONTINUED.

8. **DAMAGES—PERSONAL INJURIES — AGGRAVATION OF CONDITIONS — ISSUES—INSTRUCTIONS.** In an action for personal injuries in which the plaintiff alleged, and her evidence tended to prove, that she "was a strong, able-bodied woman prior to the accident," which caused appendicitis and a retroverted womb, and necessitated surgical operations, and in which the sole defense was that, prior to the accident, she had appendicitis and retroverted womb, which were in no manner caused or affected by the accident, plaintiff was not entitled to an instruction that she could recover for any aggravation of a diseased condition known to her prior to the accident, since it was outside of the issues made by the pleadings and proof. *Frick v. Washington Water Power Co.*..... 214
9. **DAMAGES—AGGRAVATION OF INFIRMITY—TRIAL—ISSUES AND PROOF—INSTRUCTIONS.** Although the plaintiffs, in a personal injury case, contended that the injured party was sound in body prior to the injury, the court may, on evidence tending to show a bodily infirmity, frame its own instructions so as to permit the jury to award damages for aggravation of a bodily infirmity. *Zolawenski v. Aberdeen* 95

DEATH:

Of party to action ground for abatement, see **ABATEMENT AND REVIVAL**, 2.

Presentment of claims after death of party pending suit, see **EXECUTORS AND ADMINISTRATORS**, 2.

1. **DEATH — WRONGFUL DEATH — INFANTS — MEASURE OF DAMAGES — STATUTES—EVIDENCE.** Under Rem. & Bal. Code, § 184, providing that parents may maintain an action for the death of a child, which is construed to limit the recovery to the value of the child's services to the age of majority, substantial damages may be recovered, without proof of special pecuniary loss, for the death of a baby girl, notwithstanding the parents are in comfortable circumstances financially, and capable of educating the child until the age of majority, which it had been their purpose to do. *Atkeson v. Jackson Estate* 233

DEBT:

Apportionment of on formation of new county, see **COUNTIES**, 3.
Corporate indebtedness, see **MUNICIPAL CORPORATIONS**, 24-26.

DEBTOR AND CREDITOR:

See **FRAUDULENT CONVEYANCES**.

DECEDENTS:

Estates, see **EXECUTORS AND ADMINISTRATORS**.

DECISION:

Decisions reviewable, see **APPEAL AND ERROR**, 1, 2.

On appeal, see **APPEAL AND ERROR**, 24-26.

Rulings on demurrer, see **TRIAL**, 2.

DEDICATION:

Vacation of dedicated street, see **HIGHWAYS**, 3.

DEEDS:

Relief in equity on ground of mistake, see **EQUITY**.

Absolute deed as mortgage, see **MORTGAGES**, 1.

Reformation, see **REFORMATION OF INSTRUMENTS**, 4.

DELAY:

In filing briefs, see **APPEAL AND ERROR**, 17.

In filing motion to recall remittitur, see **APPEAL AND ERROR**, 26.

Laches, see **EQUITY**.

DEMAND:

For jury trial to ascertain damages, see **EMINENT DOMAIN**, 4.

For copy of writing pleaded, see **EVIDENCE**, 2.

DEMURRER:

To information, see **INDICTMENT AND INFORMATION**, 3.

Right to rest upon demurrer *ore tenus*, see **TRIAL**, 2.

DEPARTURE:

In pleading, see **PLEADING**, 2, 4.

DEPENDENTS:

Payment to under industrial insurance act, see **MASTER AND SERVANT**, 1, 2.

DESCRIPTION:

In deed fixing boundary, see **BOUNDARIES**.

Mistake in describing property, see **REFORMATION OF INSTRUMENTS**, 1.

DILIGENCE:

In filing motion to recall remittitur, see **APPEAL AND ERROR**, 26.

In rescinding contract of sale, see **SALES**, 1.

DIRECTING VERDICT:

In civil actions, see **TRIAL**, 4, 5.

DISABILITIES:

Effect on limitations, see **LIMITATION OF ACTIONS**.

DISCONTINUANCE:

Of office, see **MUNICIPAL CORPORATIONS**, 2, 3, 5.

DISCRETION OF COURT:

To grant continuance, see **CRIMINAL LAW**, 3.

DISMISSAL AND NONSUIT:

Effect of dismissal of pending action, see **ABATEMENT AND REVIVAL**, 1.
Failure to serve notice of appeal ground for dismissal, see **APPEAL AND ERROR**, 8.

Dismissal of appeal for delay in filing briefs, see **APPEAL AND ERROR**, 17.

Harmless error in granting of, see **APPEAL AND ERROR**, 20, 22.

Dismissal of charge for want of speedy trial, see **CRIMINAL LAW**, 1, 2.

DISQUALIFICATION:

Voluntary act of by defendant, see **SPECIFIC PERFORMANCE**, 5.

DIVORCE:

Premature action to recover interest in community property, after entry of interlocutory decree, see **ACTION**, 2.

Prosecution for nonsupport of minor child, in aid of divorce decree, see **PARENT AND CHILD**.

Supplemental complaint in action for, see **PLEADING**, 3, 4.

1. **DIVORCE—ATTORNEY'S FEES—ADEQUACY OF ALLOWANCE—EVIDENCE—SUFFICIENCY.** Where a defendant in a divorce case represented to attorneys that she had been overreached in a settlement, receiving only \$125,000 from the plaintiff, who was worth over \$1,000,000, and the attorneys examined many papers, and filed an answer, cross-complaint, and a number of motions and affidavits and appeared in court three times, procuring an order for \$500 suit money, which was paid over to them, an allowance of but \$350 as attorney's fees, on substituting other counsel, is inadequate, and on evidence estimating the value from \$100 to \$4,000, should be fixed at \$1,000, in view of the value of the property and the services rendered. *Jones v. Jones* 517

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**.

DUPLICITY:

Of information, see **FORGERY**, 2; **INDICTMENT AND INFORMATION**, 3.

EASEMENTS:

Water rights, see **WATERS AND WATER COURSES**, 4-6, 8.

EJECTMENT:

1. **EJECTMENT—TITLE.** In ejectment, the plaintiff must recover on the strength of his own title. *Hauge v. Walton*..... 554
2. **EJECTMENT—SUPERIOR TITLE—BURDEN OF PROOF—OUSTER.** In ejectment, proof that plaintiff was in peaceable exclusive possession and

EJECTMENT—CONTINUED.

was forcibly ousted by the defendants raises a presumption of superior title, and casts the burden of proof upon the defendants.

Dicus v. Major 398

8. **EJECTMENT—EVIDENCE—SUFFICIENCY.** In ejectment to determine a disputed boundary line, plaintiff's *prima facie* case of superior title by reason of prior possession, supported by the fact that the adjoining owners had agreed upon the location and platted to the line claimed, is not overcome by proof that city officials had fixed the line four feet therefrom, where there was no evidence of the methods followed in the surveys made to determine the location.
- Dicus v. Major* 398

ELECTION:

Between counts in information, see **INDICTMENT AND INFORMATION**, 3.

To foreclose separate mortgage in one county, see **MORTGAGES**, 2.

ELECTIONS:

Contesting local option election, see **INTOXICATING LIQUORS**, 2, 3.

Notice of special school election, see **SCHOOLS AND SCHOOL DISTRICTS**, 3.

1. **ELECTIONS—BALLOTS—MAJORITY—THREE-FIFTHS OF QUALIFIED VOTERS—REJECTED BALLOTS.** Under Rem. & Bal. Code, § 8006, requiring an affirmative vote in a municipal bond election, by three-fifths of the qualified voters voting at the election, ballots improperly cast or rejected are not to be counted in determining the total vote cast.
- State ex rel. Short v. Clausen*..... 409

ELECTRICITY:

1. **ELECTRICITY—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** It is negligence on the part of a telegraph company for its employees in making repairs to cause a break in the lines and contact with high tension wires of a power company, the wires dropping to the ground and coming in contact with a wire fence, and to go away and leave it in its dangerous condition without notifying persons in the vicinity. *Metz v. Postal Telegraph Cable Co.*..... 188
2. **SAME—NEGLIGENCE—PROXIMATE CAUSE OF ACCIDENT.** In such case, the telegraph company is not relieved of liability by the fact that the power company, after notice of trouble, through its automatic circuit breaker, turned on the current at intervals, according to the usual custom, in order to locate the trouble, where the telegraph company did not notify it of the actual trouble and should have anticipated the action of the power company. *Metz v. Postal Telegraph Cable Co.* 188
3. **ELECTRICITY—HIGH VOLTAGE WIRES—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** Negligence in the maintenance of a high voltage power line along a county road, carried on cross-arms forty feet above

ELECTRICITY—CONTINUED.

the ground, is not shown from the fact that the line came in contact with a hay-loading derrick forty-five feet high, with a revolving arm, which was being hauled along the highway, where there was no evidence that it was usual or customary to haul such derricks along the highway. *Mayhew v. Yakima Power Co.*..... 431

ELEVATORS:

Personal injury to passenger, see CARRIERS, 6, 7.

EMINENT DOMAIN:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 7, 8.

1. EMINENT DOMAIN—PUBLIC USE—NECESSITY. Where a railroad company requires a right of way sixty feet wide in a canyon or gulch, in order to make necessary fills, cuts, and turnouts, an adjudication of public use is sustained, although the landowners, who were owners of a sawmill, needed part of the way for a logging road over which to haul forest products of their own and others. *State ex rel. Luedinghaus v. Superior Court*..... 480
2. EMINENT DOMAIN—GRADE OF STREET—"DAMAGING" OF PROPERTY—COMPENSATION—REMEDIES—INJUNCTION. A city in making the original grade of a street, has no right to extend the foot of the fill upon abutting property, or in making a cut, to construct the slope thereon; since it would be a "damaging" of private property without just compensation having been first paid into court, within Const., art. 1, § 16; and injunction is the proper remedy to prevent the same, if the damages are substantial. *Donofrio v. Seattle*... 178
3. EMINENT DOMAIN—PROCEEDINGS—SEPARATE ACTIONS—NECESSITY. In an action to quiet title, to restrain a trespass, and to enjoin the use of irrigating ditches across the plaintiff's land, the defendant having the right to condemn a right of way for irrigation, may set up the same by way of defense to plaintiff's demand for an injunction, and have the damages ascertained without resorting to a separate condemnation proceeding. *White v. Stout*..... 62
4. SAME—PROCEEDINGS—DAMAGES—RIGHT TO JURY TRIAL—DEMAND. In such a case, plaintiff cannot allege error in that he was deprived of a jury trial to ascertain his damages for the condemnation, where he did not demand a jury trial, in view of his election to proceed in equity for an injunction instead of at law in ejectment. *White v. Stout* 62
5. SAME—PROCEEDINGS—DECREE—PAYMENT OF AWARD AND COSTS BEFORE TAKING. A suit for an injunction to prevent the use of irrigation ditches, in which the defendant set up as a defense his right to condemn, and plaintiff's damages therefor were awarded, with plaintiff's costs of suit, plaintiff cannot object that a decree enjoining the plaintiff from interfering with the ditches, upon defend-

EMINENT DOMAIN—CONTINUED.

ant's paying the damages into court, authorized the taking without prior payment of the damages, including costs, in view of the rule that the compensation must be first paid into court and includes the costs, which defendant concedes must be paid prior to decree of appropriation. *White v. Stout* 62

EMPLOYEES:

See MASTER AND SERVANT.

EQUALIZATION:

Of taxes, see TAXATION, 3.

EQUITY:

See REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE; TRUSTS.
Legal or equitable relief, see ACTION, 1.

Equitable estoppel, see ESTOPPEL, 2.

Effect in equity of parol partition between tenants in common, see TENANCY IN COMMON, 1.

1. EQUITY—LACHES—REFORMATION OF INSTRUMENTS—DELAY. A delay of three years in bringing action will not defeat the right to reform a deed which by mutual mistake provided that the grantor, instead of the grantee, assumed payment of a mortgage, where no rights of third parties were involved, the parties had early notice of plaintiff's claim, and no one was placed in a worse position by reason of the delay, and there was no evidence of fraud or bad faith. *Young v. Jones* 277

ESTABLISHMENT:

Of boundary, see BOUNDARIES.

Of highways, see HIGHWAYS, 1, 2.

Of joint school districts, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Of trusts, see TRUSTS.

ESTATES:

See LIFE ESTATES.

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Tenancy in common, see TENANCY IN COMMON.

Trusts, see TRUSTS.

ESTOPPEL:

Of executors to contest claims not presented, see EXECUTORS AND ADMINISTRATORS, 7.

By judgment, see JUDGMENT, 2-5.

Of lessor to deny right of sublessees to attorn under lease, see LANDLORD AND TENANT, 1.

1. ESTOPPEL—BY RECORD—HIGHWAYS—PETITION TO VACATE. A petition to vacate a portion of a highway does not estop the signer from

ESTOPPEL—CONTINUED.

asserting title thereto, on denial of the petition, where the necessary elements of an estoppel are not present. *In re Twenty-Second Avenue Southwest* 99

2. **ESTOPPEL—BY CONDUCT—VALIDITY OF ASSIGNMENT.** The acceptance, from an assignee, of goods sold, with knowledge that the contract had been assigned, estops the vendee from questioning the assignment. *King v. West Coast Grocery Co.*..... 132

EVICTIION:

Of tenant of demised premises, see **LANDLORD AND TENANT**, 5.

EVIDENCE:

See **ACCORD AND SATISFACTION**; **LARCENY**; **PAYMENT**.

Incorporation in record on appeal, see **APPEAL AND ERROR**, 12, 13, 15, 19.

In prosecution for aggravated assault, see **ASSAULT**.

In action to recover money paid to attorney, on ground of fraud, see **ATTORNEY AND CLIENT**, 3.

Establishment of boundary, see **BOUNDARIES**.

Right to commission on sale of property, see **BROKERS**, 2.

To sustain conviction, see **BURGLARY**.

For personal injuries to passenger, see **CARRIERS**, 2, 3, 6-9.

Of fraud in procuring release of damages, see **COMPROMISE AND SETTLEMENT**.

To aid construction of contract, see **CONTRACTS**, 3, 4.

Of fraud in sale of corporate stock, see **CORPORATIONS**, 7.

Of valid execution of lease by corporation, see **CORPORATIONS**, 9.

Of assignment of contract by corporation, see **CORPORATIONS**, 10.

Proof of payment of corporate license fee, see **CORPORATIONS**, 11-13.

To ascertain prospective profits upon breach of contract, see **DAMAGES**, 1.

In action for wrongful death, see **DEATH**.

Adequacy of allowance to attorneys in divorce proceedings, see **DIVORCE**.

Of title and right to possession, see **EJECTMENT**, 3.

Of negligence, see **ELECTRICITY**, 1, 3.

In prosecution for violation of fishing law, see **FISH**, 3, 4.

In prosecution for forgery, see **FORGERY**, 4, 5.

Establishment of highway by prescription, see **HIGHWAYS**, 1, 2.

Of necessitous circumstances of wife in prosecution for nonsupport, see **HUSBAND AND WIFE**, 3, 5.

Of wilful neglect by husband, see **HUSBAND AND WIFE**, 4.

To show bias of juror, see **JURY**.

In action for breach of lease by landlord, see **LANDLORD AND TENANT**, 6.

For injuries to servant in general, see **MASTER AND SERVANT**, 5-8, 11, 25.

EVIDENCE—CONTINUED.

Of sale and delivery of material to independent contractor, see **MECHANICS' LIENS**, 1.

As to gaseous condition of mine, see **MINES AND MINERALS**, 2.

To show making of loan, see **MONEY LENT**.

Absolute deed as mortgage, see **MORTGAGES**, 1.

Alteration of petition for public improvement, see **MUNICIPAL CORPORATIONS**, 6.

Negligence of contractor causing injury to pedestrian during grading of street, see **MUNICIPAL CORPORATIONS**, 12.

Negligence in allowing obstruction in city sewer, see **MUNICIPAL CORPORATIONS**, 22.

Negligence in allowing water to escape from city main, see **MUNICIPAL CORPORATIONS**, 23.

Navigable character of stream, see **NAVIGABLE WATERS**, 1-3.

To show partnership, see **PARTNERSHIP**, 1.

Negligence in treatment of patient, see **PHYSICIANS AND SURGEONS**, 1.

Admissibility of evidence under pleading, see **PLEADING**, 5.

Of mistake in instrument, see **REFORMATION OF INSTRUMENTS**.

For personal injuries, see **STREET RAILROADS**, 5.

Payment of taxes, see **TAXATION**, 4.

Reception at trial, objections, see **TRIAL**, 1.

Establishment of trust, see **TRUSTS**.

Of intention to abandon waste ditch, see **WATERS AND WATER COURSES**, 7, 8.

Testimony of witnesses, see **WITNESSES**.

For services, see **WORK AND LABOR**, 2, 3.

1. **EVIDENCE—DAMAGES—MENTAL SHOCK—RES GESTAE.** Upon an issue as to the amount of damages sustained in a railway collision by a passenger who was thrown to the floor and suffered traumatic neurasthenia, it is error to admit evidence that some time after she saw other passengers covered with blood, being transferred to the city in a street car, which shock might have contributed to her condition, and heard statements made on the street car, it not being shown that those injured were in the same railway car with the plaintiff and the statements made not being part of the *res gestae* (overruling *Id.*, 67 Wash. 96). *Taylor v. Spokane, Portland & Seattle R. Co.*..... 378
2. **EVIDENCE—DEMAND OF COPY OF WRITING PLEADED—MASTER AND SERVANT—NOTICE UNDER FACTORY ACT—PROOF.** Rem. & Bal. Code, § 284, providing that it shall not be necessary to plead a copy of an instrument of writing or the items of an account alleged but precluding evidence thereof if the copy be not furnished upon demand, has no application to a copy of the notice of the time, place, and injury required by the factory act to be given to an employer upon an injury to a servant on unguarded machinery, which is merely a condition precedent to action, and not the basis of the liability. *Mathis v. Western Furniture Mfg. Co.*..... 206

EVIDENCE—CONTINUED.

3. **EVIDENCE—LOST WRITING—PAROL EVIDENCE.** Parol testimony to prove a written assignment of an account which had been lost is admissible, where it appears that plaintiffs claimed through a written assignment from a copartnership, that the assignment in question had theretofore been made to the copartnership upon a change in the firm membership, and that three years had elapsed since the first assignment had been made. *Bullock v. Stanley*..... 204
4. **EVIDENCE—EXPERT EVIDENCE—OPINION AS TO MEDICAL TREATMENT—HYPOTHETICAL QUESTIONS.** In an action for malpractice, expert medical witnesses may express opinions, based upon a hypothetical question containing a fair summary of the facts shown by plaintiff's evidence, as to whether the treatment given plaintiff was such as an ordinary skillful physician in that community would have used for plaintiff's injury. *Taylor v. Kidd*..... 18
5. **EVIDENCE—HYPOTHETICAL QUESTIONS—VARIANCE—MATERIALITY.** It is not a material variance between the facts of the case and a hypothetical question, that the plaintiff reached camp unaided by walking and crawling half a mile instead of being taken there; nor that he was attended by a physician at Seattle, instead of being taken home from Seattle; nor that he was "laid up" at home about a month, instead of "staying at home in bed for about a month." *Knutson v. Moe Brothers*..... 290
6. **EVIDENCE—TESTIMONY AT FORMER TRIAL—CERTIFICATION OF WRITING—NOTICE—ADMISSIBILITY.** Under Rem. & Bal. Code, § 1247, providing that the testimony of an absent witness, given in at a former trial, when reported by a stenographer and certified by the trial judge upon three days' notice, may be given in evidence, it is not necessary that notice be given of an intention to recertify testimony that was certified by the trial judge to be used on an appeal. *Knutson v. Moe Brothers*..... 290

EXAMINATION:

- Of expert witnesses, see EVIDENCE 4.
- Of witnesses in general, see WITNESSES.

EXCEPTIONS:

- Necessity for purpose of review, see APPEAL AND ERROR, 6, 7.
- Taking exceptions at trial, see TRIAL, 6.

EXCEPTIONS, BILL OF:

- Necessity for purpose of review, see APPEAL AND ERROR, 12-14.
- Sufficiency of on criminal appeal, see CRIMINAL LAW, 10.

EXCESSIVE ASSESSMENT:

- See TAXATION, 1, 2.

EXCESSIVE DAMAGES:

See DAMAGES, 2-6.

For malpractice, see PHYSICIANS AND SURGEONS, 2.

EXECUTION:

Of contract by corporation, see CORPORATIONS, 9.

Of conditional sale contract after delivery of possession, effect, see SALES, 3.

Of contract by one party as affecting mutuality of obligation, see SPECIFIC PERFORMANCE, 4.

1. EXECUTION—SALE—CONFIRMATION—MATTERS AND OBJECTIONS CONSIDERED—CLAIM OF HOMESTEAD. In view of Rem. & Bal. Code, § 591, providing that the only objections to be considered upon the confirmation of an execution sale are such as go to the regularity of the proceeding, the claim of the judgment debtor to a homestead cannot be heard or tried upon the hearing for confirmation of the sale, upon the mere filing of a declaration of intention as to unoccupied land. *Scott v. Guiberson*..... 36
2. SAME—CONFIRMATION OF SALE—IRREGULARITIES—APPRAISEMENT OF HOMESTEAD. The failure, upon an execution sale, to make an appraisement of a homestead claim is not an irregularity, where no homestead claim was asserted or declaration of intention filed at the time of the levy, pursuant to Rem. & Bal. Code, § 591 *Scott v. Guiberson* 36

EXECUTORS AND ADMINISTRATORS:

Claims against community estate, see HUSBAND AND WIFE, 9.

1. EXECUTORS AND ADMINISTRATORS — APPOINTMENT — RIGHT TO LETTERS—HUSBAND AND WIFE—COMMUNITY PROPERTY. Under Rem. & Bal. Code, § 1389, giving the husband the preference right to letters of administration upon the estate of his deceased wife, he cannot be deprived thereof by the fact that he claimed to own the homestead as his separate property and declined to inventory it as belonging to the estate; since the rents and profits may be covered by the bond, pending determination of the title, the failure to mention the property does not defeat or cloud the title, and the court may take evidence to determine whether it shall be included in the inventory, under Rem. & Bal. Code, § 1450, requiring the administrator to make a true inventory, and § 1457, providing for revocation of his letters if he refuses to do so. *Buchser v. Buchser*.... 675
2. EXECUTORS AND ADMINISTRATORS — CLAIMS — PRESENTMENT—DEATH PENDING SUIT—HUSBAND AND WIFE. Rem. & Bal. Code, § 1481, providing that if any action be pending against the deceased at the time of his death, the plaintiff shall present his claim for allowance, and no recovery shall be had in the action unless proof be made of the presentment, has no application to an action against a husband alone on a community debt, whose wife died pending suit; since the plaintiff had a right to a judgment against the husband binding his

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- separate estate, and since the wife was not a party to the suit. *First National Bank v. Cunningham*..... 532
3. **EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—“DATE OF NOTICE.”** Where a notice to creditors, dated September 16, required creditors to present claims within one year after the “first publication” of the notice, which was September 17, and was indorsed at the foot of the notice, the date of the notice is the date of its first publication, and it complies with Rem. & Bal. Code, § 1470, requiring presentation of claims within “one year after the date of such notice.” *Seattle Nat. Bank v. Dickinson*..... 403
4. **SAME—NOTICE TO CREDITORS—ORDER FOR PUBLICATION.** Rem. & Bal. Code, § 1470, providing that notice to creditors shall be published as often as the court shall deem necessary, not less than once a week for four successive weeks, does not require an order of court as a condition precedent to the first publication, but an order approving the notice may be taken any time before final settlement. *Seattle Nat. Bank v. Dickinson*..... 403
5. **SAME—NOTICE TO CREDITORS — PRESENTATION.** The act of going to the place of business of the executors, named in the notice to creditors, with intent to present a claim, is not a presentation of the claim, although the office was closed and the executor temporarily absent, in view of Rem. & Bal. Code, § 1474, requiring the executor to indorse his acceptance or rejection on the notice, and to notify the creditor, and § 1475, providing that it shall be filed in court. *Seattle Nat. Bank v. Dickinson*..... 403
6. **SAME—NOTICE TO CREDITORS—WAIVER.** An executor cannot waive the statute requiring claims to be presented, nor bind the estate by promising to pay an unrepresented claim or by making payments thereon, in view of Rem. & Bal. Code, § 1472, providing that claims not presented within one year shall be barred, and § 1479, providing that no action shall be maintained thereon unless the claim shall have been first presented. *Seattle Nat. Bank v. Dickinson*..... 403
7. **SAME—CONTESTING CLAIMS—ESTOPPEL.** Executors who are sole devisees and legatees are not estopped to resist a claim that was not presented within one year, by their promise to pay it and the making of small payments thereon, where the claimant did not rely upon the promise but sought and failed to present his claim in the legal way, and other creditors might be adversely affected. *Seattle Nat. Bank v. Dickinson*..... 403

EXPERT TESTIMONY:

In civil actions, see EVIDENCE, 4.

EXPRESS TRUSTS:

See TRUSTS.

FACTORY ACT:

Evidence of service of notice required by, see **EVIDENCE**, 2.

Guarding machinery under factory act, see **MASTER AND SERVANT**, 24.

FEEs:

Right of attorney to appeal from order fixing fees, see **APPEAL AND ERROR**, 3.

Of attorney, see **ATTORNEY AND CLIENT**.

Allowance of attorneys' fees in action by stockholders, see **CORPORATIONS**, 8.

Allowance of attorney's fees in divorce proceedings, see **DIVORCE**.

Allowance of attorney's fees on appeal from decision of industrial insurance department, see **MASTER AND SERVANT**, 2.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 13.

FILING:

Delay in filing briefs, see **APPEAL AND ERROR**, 17.

Motion to recall remittitur, see **APPEAL AND ERROR**, 26.

Of articles of incorporation in other county as changing place of business, see **CORPORATIONS**, 2.

Conditional sales contracts in county of residence, see **CORPORATIONS**, 1-3.

FINAL JUDGMENT:

Appealability, see **APPEAL AND ERROR**, 1.

FIRE INSURANCE:

See **INSURANCE**.

FISH:

1. **FISH—FISHING REGULATIONS—VIOLATION OF STATUTE—ELEMENTS OF OFFENSE—INTENT.** Intent is not an essential element of the offense of unlawful fishing, in violation of Rem. & Bal. Code, § 5186, requiring all fishing appliances to be closed in a certain way at specified hours each week; and the jury is properly instructed that they may convict regardless of the intent or wilfulness of the act of the accused, it being sufficient to show a failure to close the traps in the manner required by law. *State v. Cherry Point Fish Co.* 420
2. **SAME—REGULATIONS—"TAUT" APRONS—"EFFECTUALLY" CLOSING TRAPS.** The provisions of Rem. & Bal. Code, § 5186, prohibiting salmon fishing at certain hours each week, and requiring nets and traps to be closed by an apron across the entrance, fastened by rings on a "taut" wire, so as to "effectually prevent" any salmon from entering, is to be construed in its ordinary sense; "taut" not meaning merely "substantially and practically tight;" and "effectually preventing" not meaning "substantially and practically" preventing fish from entering; and an instruction that the accused could not

FISH—CONTINUED.

be found guilty if they had closed their traps by the appliances required by law, drawn as "taut or tight as it could reasonably be drawn consistent with . . . raising and lowering the same," is as favorable to the accused as the construction warrants. *State v. Cherry Point Fish Co.* 420

3. **FISH—FISHING APPLIANCES—VIOLATIONS—EVIDENCE—REBUTTAL.** In a prosecution for unlawful fishing, where the accused sought to show that the openings in the aprons to their traps were the inevitable result of the plan required by law, and not to faulty construction, it is proper in rebuttal to show that other aprons in the vicinity constructed on the same plans remained in place and effectually closed the traps as required by law. *State v. Cherry Point Fish Co.* 420

4. **SAME—EVIDENCE—RELEVANCY.** In a prosecution for violation of the fishing law (Rem. & Bal. Code, §5186), requiring traps and nets to be closed at certain hours with an apron on a "taut" wire, evidence that when examined a week previous to the time mentioned, the wire was in a slack condition, is relevant to show its condition at the time alleged. *State v. Cherry Point Fish Co.* 420

FORECLOSURE:

Of lien, see **MECHANICS' LIENS**.
Of mortgage, see **MORTGAGES**, 2-4.

FOREIGN LAWS:

Presumptions as to, see **STATUTES**, 3.

FORFEITURE:

Of right to rescind contract, see **MINES AND MINERALS**, 5.

FORGERY:

1. **FORGERY—ELEMENTS—DEFENSES.** In a prosecution for forgery of a check, it is immaterial, and not a defense, that the accused used the proceeds in an unlawful gambling game conducted by the party who cashed the check. *State v. McBride* 390
2. **FORGERY—INFORMATION—DUPLICITY.** Under Rem. & Bal. Code, § 2583, defining forgery in the first degree as the forging of any writing with intent to defraud, and § 2587, making it forgery in the same degree to knowingly utter a forged instrument with intent to defraud, an information is not duplicitous and charges but one crime, where it charges the forging and uttering of one instrument by the same person with intent to defraud in both of the statutory ways, as part of one connected transaction, continuous in point of time; as the two ways are not repugnant to each other. *State v. McBride* 390
3. **FORGERY—PRESUMPTIONS FROM POSSESSION—INSTRUCTIONS.** In a prosecution for forgery, it is error to instruct that possession of a forged check raises a presumption of guilt. *State v. McBride* . . 390

FORGERY—CONTINUED.

4. **SAME—EVIDENCE—ADMISSIBILITY.** In a prosecution for forgery of a check, evidence that the person whose name was forged was indebted to the accused is inadmissible. *State v. McBride*..... 390
5. **SAME.** In a prosecution for forgery of a check, the person whose name was forged cannot be asked if he would have paid the check if it had been presented to him by a bank or any legitimate holder. *State v. McBride*..... 390

FORMER ADJUDICATION:

See JUDGMENT, 2-5.

FORMS OF ACTION:

See ACTION, 1.

FRANCHISE:

Grant by municipality, see MUNICIPAL CORPORATIONS, 1.
 Grant of to street railroad, see STREET RAILROADS, 1, 2.

FRAUD:

See FRAUDULENT CONVEYANCES; SALES, 1.
 Of attorney, see ATTORNEY AND CLIENT, 3.
 In procuring release of damages, see COMPROMISE AND SETTLEMENT.
 In sale of corporate stock, see CORPORATIONS, 7.
 Larceny by false representations, see LARCENY, 2.
 Setting aside assessment for, see TAXATION, 2.
 Of cotenant in trade of interests in cotenancy, see TENANCY IN COMMON, 2.

FRAUDS, STATUTE OF:

Parol partition between tenants in common, see TENANCY IN COMMON.

1. **FRAUDS, STATUTE OF—ORAL PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL UNDERTAKING—CONSIDERATION.** Where the owner of timber sold the same to a logger, to be paid for as removed, and was interested in the logging operations to the extent that his profits depended thereon, his promise to a merchant, supplying the logger with goods for the camp, to pay the balance due on the account and also to pay for all merchandise thereafter furnished, in case credit was extended and goods supplied for the operations, is a direct and original undertaking on a sufficient consideration and not a promise to pay the debt of another; and hence is not within the statute of frauds. *Davies v. Carey*..... 537
2. **FRAUDS, STATUTE OF—BROKER'S COMMISSIONS.** A verbal contract for a broker's commissions, made by one who was equitably a joint owner of the property, is within Rem. & Bal. Code, § 5289, requiring contracts for a broker's commissions to be in writing, at least if the broker knew or should have known of the fact of such joint ownership. *Parker v. Bruggemann*..... 309

FRAUDULENT CONVEYANCES:

1. **FRAUDULENT CONVEYANCES—SALES IN BULK—AFFIDAVIT AS TO CREDITORS—LIABILITY OF PURCHASER—GARNISHMENT—PERSONAL LIABILITY OF GARNISHEE.** When a purchaser of a stock of goods in bulk fails to take an affidavit as to the creditors, which by Rem. & Bal. Code, § 5296, is made a prerequisite of the validity of sales in bulk, he becomes a trustee, and if he disposes of part of the goods; he becomes personally liable to the creditors of the vendor, without first pursuing the property, and without showing that he, as a garnishee defendant, has sufficient of the property of the debtor remaining under his control to satisfy the judgment. *Friedman v. Branner*..... 338

FUNDS:

Expending public funds on road as establishing public highway, see **HIGHWAYS, 2.**

GAMING:

Larceny by trick or bunco game, see **LARCENY, 1.**

GAS:

Injuries to miner from gas explosion, see **MINES AND MINERALS, 1, 2.**

GOOD FAITH:

Payment of taxes under color and claim of title in good faith, see **LIFE ESTATES, 4.**

Incumbrancers in good faith, see **SALES, 2.**

GRANTS:

Of public lands, see **PUBLIC LANDS.**

Grant of franchise to street railroad, see **STREET RAILROADS, 1, 2.**

Grant of easement by implication, see **WATERS AND WATER COURSES, 4.**

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR, 20-22.**

In criminal prosecution, see **CRIMINAL LAW, 12.**

HIGHWAYS:

See **NAVIGABLE WATERS, 1.**

Estoppel to assert title to on signing petition to vacate, see **ESTOPPEL, 1.**

1. **HIGHWAYS—ESTABLISHMENT — PRESCRIPTION — EVIDENCE—SUFFICIENCY.** A sixty-foot strip of land, petitioned for as a county road in 1873, it not established as a highway by prescription, where its use as a highway was begun in 1895, without record authority, and was interrupted in 1904 by placing fences with gates across it and posting notices declaring it to be private property; since the use was not uninterrupted and continuous for ten years. *In re Twenty-Second Avenue Southwest*..... 99

HIGHWAYS—CONTINUED.

2. **HIGHWAYS — ESTABLISHMENT — PRESCRIPTION — EXPENDITURE OF PUBLIC FUNDS—EVIDENCE—SUFFICIENCY.** Use of a private way granted to neighbors, who had no other access to the public road, does not create a public highway by prescription, nor under Rem. & Bal. Code, § 5657, making such roads public highways when they have been "worked and kept up at the expense of the public" for seven years, where it appears that for eleven years the way had been used exclusively for the convenience of one owner, a gate had been maintained across it, and not exceeding \$20 or \$25 of public funds had been expended on it during fourteen years. *Saeger v. Baldwin* 197
3. **HIGHWAYS—VACATION — BY ABANDONMENT — OPENING FOR PUBLIC USE—WHAT CONSTITUTES.** Rem. & Bal. Code, § 5673, providing that if any county road remains unopened for public travel for five years after the authority for opening the same is granted, it shall become vacated, applies to a dedicated street in the plat of an unincorporated town under the supervision and control of the county commissioners; and such a street is not "opened for public travel" by the fact that at the time the land was platted a footpath followed the general course of the platted way and was used for some time after the making and dedication of the plat until it was closed up. *Cheney v. King County*..... 490

HOMESTEAD:

Claim of in property levied upon, see **EXECUTION**.

Effect of claim by husband as separate property on right to administer wife's estate, see **EXECUTORS AND ADMINISTRATORS**, 1.

HUSBAND AND WIFE:

See **MARRIAGE**.

Joint liability for costs, see **Costs**.

Preference right of husband to administer upon estate of deceased wife, see **EXECUTORS AND ADMINISTRATORS**, 1.

Death of wife pending suit against husband, as affecting presentment of claim, see **EXECUTORS AND ADMINISTRATORS**, 2.

Prosecution of minor husband for nonsupport, see **INFANTS**.

1. **HUSBAND AND WIFE — NONSUPPORT — INFORMATION — SUFFICIENCY.** An information for nonsupport, under Rem. & Bal. Code, § 2444, is sufficient where it follows the language of the statute. *State v. McPherson* 371
2. **HUSBAND AND WIFE—NONSUPPORT—MINOR HUSBAND.** Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to desert or wilfully neglect to support his wife, applies to a voidable marriage between minors, until a decree of annulment is entered by a court of competent jurisdiction. *State v. McPherson*..... 371

HUSBAND AND WIFE—CONTINUED.

3. **SAME — NECESSITOUS CIRCUMSTANCES — EVIDENCE — SUFFICIENCY.** Upon a prosecution for nonsupport of a wife there is sufficient evidence of "necessitous circumstances" within Rem. & Bal. Code, § 2444, where it appears that she had been pregnant for five or six months, and had no money and no means to make monthly payments of \$10 on her furniture, and left to live with her mother at defendant's direction. *State v. McPherson*..... 371
4. **SAME—WILFUL NEGLECT—EVIDENCE—SUFFICIENCY.** There is sufficient evidence of wilful refusal to support a wife, where the defendant testified that he was earning \$9 per week as clerk, and it appears that he represented that he was getting \$15 per week and expected a raise, and demurred to his wife's getting a lodging house and keeping roomers, but sent her away to her mother, and he contributed nothing toward her support for three months prior to the trial. *State v. McPherson*:..... 371
5. **SAME — NECESSITOUS CIRCUMSTANCES — EVIDENCE — ADMISSIBILITY.** In a prosecution for nonsupport, evidence of the wife's pregnancy is admissible to prove her necessitous condition. *State v. McPherson* 371
6. **SAME—"NECESSITOUS CIRCUMSTANCES"—INSTRUCTIONS.** Under Rem. & Bal. Code, § 2444, providing that "every person who shall wilfully and without lawful excuse desert, or wilfully neglect or refuse to provide for the support and maintenance of his wife . . . being in necessitous circumstances, shall be punished" etc., the words "necessitous circumstances" qualify all the preceding words, and it is error to instruct that the accused would be guilty if (a) he deserted his wife without lawful excuse, or (b) wilfully failed to support her, she being in necessitous circumstances. *State v. McPherson* 371
7. **SAME—NONSUPPORT—JUDGMENT—MINOR HUSBAND.** Upon conviction of wife desertion or nonsupport by a minor husband, a judgment of imprisonment should be limited to the continuance of the marriage state, the marriage being voidable. *State v. McPherson* 371
8. **HUSBAND AND WIFE—INJURIES TO WIFE—DAMAGES—LOSS OF SERVICES.** In an action by a husband and wife for personal injuries sustained by the wife, the loss by the husband of the wife's services is a proper element of damages. *Zolawenski v. Aberdeen*..... 95
9. **HUSBAND AND WIFE—COMMUNITY PROPERTY—EXECUTORS AND ADMINISTRATORS—CLAIMS—COMMUNITY DEBTS.** Upon the death of the wife, a judgment recovered against the husband alone on a community debt is properly established as a claim against the estate of the community. *First National Bank v. Cunningham*..... 532
10. **HUSBAND AND WIFE—COMMUNITY DEBTS—JUDGMENT—FORM.** In an action against a husband and wife upon a community debt contracted by the husband alone, a judgment in form against both husband and wife, is erroneous, since it is enforceable against the wife as her

HUSBAND AND WIFE—CONTINUED.

separate debt, and should be against her as a member of the community only. *Davies v. Carey*..... 537

HYPOTHETICAL QUESTIONS:

See EVIDENCE, 4, 5.

IMPEACHMENT:

Of witness, see WITNESSES.

IMPLIED CONTRACTS:

See WORK AND LABOR.

IMPROVEMENTS:

On premises demised, see LANDLORD AND TENANT, 2, 3.

Public improvements, see MUNICIPAL CORPORATIONS, 6-11, 13-16

INCUMBRANCES:

Chattel mortgage as prior incumbrance over unrecorded bill of sale, see SALES, 2.

INDEMNITY:

1. INDEMNITY—BONDS—ACTIONS—LIABILITY—LIQUIDATED DAMAGES OR PENALTY. Where a landlord, who was secured by bond, was damaged in an amount exceeding the sum secured by the bond, by reason of the lessee's default, he is entitled to judgment in an action on the bond, whether for liquidated damages as specified in the bond, or by way of penalty. *Jackson Estate v. Suydam*..... 341

INDEPENDENT CONTRACTORS:

Sale and delivery of materials to, see MECHANICS' LIENS, 1.

INDICTMENT AND INFORMATION:

See FORGERY, 2.

In prosecution for nonsupport of wife, see HUSBAND AND WIFE, 1.

1. INDICTMENT AND INFORMATION—LARCENY—BY BUNCO GAME—SUFFICIENCY. Under Rem. & Bal. Code, § 2601, subd. 2, providing that every person who with intent to deprive the owner of any property by any trick, device, bunco game, or fortune telling . . . steals such property and shall be guilty of larceny, an information is sufficient if, rejecting additional matter as surplusage, enough remains to charge the offense in the language of the statute, in the absence of any motion to strike or make more definite, even though it did not describe any trick, fraud or device. *State v. Ferrato*..... 112
2. INDICTMENT AND INFORMATION—OBJECTIONS—TIME FOR TAKING. Objection to the sufficiency of the information cannot be made after a plea of not guilty, except by motion in arrest of judgment. *State v. McBride* 390
3. INDICTMENT AND INFORMATION—DUPLICITY—WAIVER. Under Rem. & Bal. Code, § 2105, prescribing the grounds of demurrer to the indictment or information, and § 2188, prescribing the grounds for

INDICTMENT AND INFORMATION—CONTINUED.

motion in arrest of judgment, the question of duplicity can only be raised by demurrer or motion to quash or compel an election, prior to plea of not guilty, and comes too late if made after verdict. *State v. McBride* 390

INDUSTRIAL INSURANCE:

See MASTER AND SERVANT, 1, 2.

INFANTS:

Nonsupport by minor husband, see HUSBAND AND WIFE, 2, 7.

Effect of infancy on limitations, see LIMITATION OF ACTIONS.

Nonsupport, see PARENT AND CHILD.

1. **INFANTS—CRIMES—MINOR HUSBAND—NONSUPPORT.** A husband under twenty-one years of age may be punished for nonsupport, under Rem. & Bal. Code, § 2444, making it a criminal offense for a husband to desert or wilfully refuse to support his wife; since he is not subject to trial only as a delinquent child, under Rem. & Bal. Code, §§ 1987-2004, as that act provides that delinquent children may be tried under the criminal code. *State v. McPherson*..... 371
2. **INFANTS—CRIMES—PUNISHMENT.** Under Rem. & Bal. Code, § 1998, relating to the punishment of delinquent children, a minor husband convicted of nonsupport should be confined apart from adult convicts. *State v. McPherson*..... 371

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INJUNCTION:

Condemnation proceedings, see EMINENT DOMAIN, 2-5.

To restrain issuance of funding bonds, see MUNICIPAL CORPORATIONS, 26.

Enjoining use of waters of stream, see NAVIGABLE WATERS, 4.

1. **INJUNCTION—NOTICE—EX PARTE APPLICATION.** A court cannot, on *ex parte* application, issue an order for parties litigant to meet, inasmuch as its effect is to issue a final injunction without notice. *State ex rel. Waughop v. Superior Court*..... 535

INSOLVENCY:

Of corporation, see CORPORATIONS, 4-6.

INSPECTION:

Duty to inspect appliances, see MASTER AND SERVANT, 4, 11, 13, 20.

Of city sewer, see MUNICIPAL CORPORATIONS, 21.

INSTRUCTIONS:

Exceptions to for purpose of review, see APPEAL AND ERROR, 6, 7.

As part of record on appeal, see APPEAL AND ERROR, 14.

Harmless error in charge to jury, see APPEAL AND ERROR, 21.

INSTRUCTIONS—CONTINUED.

In action by creditor of insolvent corporation for unlawful reduction of capital stock, see **CORPORATIONS**, 5.

In criminal prosecutions, see **CRIMINAL LAW**, 4-6, 8, 9; **FORGERY**, 3.

In prosecution for nonsupport of wife, see **HUSBAND AND WIFE**, 6.

In civil actions, see **TRIAL**, 6-10.

INSURANCE:

Industrial insurance, see **MASTER AND SERVANT**, 1, 2.

1. **INSURANCE—CONTRACT TO INSURE—ORAL CONTRACT OF AGENT.** An oral contract by agents for an insurance company to renew a policy upon its expiration, renders the company liable for damages sustained on failure to issue the policy, where the property was subsequently destroyed. *Ohenier v. Insurance Co. of North America*... 27
2. **INSURANCE — CONTRACT TO INSURE — ACTIONS—CONDITIONS PRECEDENT—PROOF OF LOSS—LIMITATIONS—WAIVER.** In an action against an insurance company for damages sustained by reason of its failure to issue a policy of fire insurance, pursuant to an oral agreement therefor, conditions precedent to an action upon the prospective policy requiring proofs of loss and that suit be commenced within twelve months, are not a defense; since conditions that would have been contained in the prospective policy are waived by denial of the contract and failure to issue the policy. *Ohenier v. Insurance Co. of North America*..... 27

INTENT:

As element of offense of unlawful fishing, see **FISH**, 1.

To abandon waste ditch, see **WATERS AND WATER COURSES**, 7-8.

INTERSTATE COMMERCE:

Regulation, see **COMMERCE**.

INTOXICATING LIQUORS:

Act prohibiting payment of license fee by manufacturer as deprivation of property without due process of law, see **CONSTITUTIONAL LAW**.

Subject and title of act prohibiting manufacturer from having interest in retail liquor licenses, see **STATUTES**, 1.

1. **INTOXICATING LIQUORS—LOCAL OPTION—DELEGATION OF LEGISLATIVE POWERS.** The local option law is not an unwarranted delegation of legislative power to the electors of the various local option units. *State v. Miller*..... 174
2. **INTOXICATING LIQUORS—LOCAL OPTION—ELECTIONS—CONTESTS—REVIEW — JURISDICTION — CERTIORARI.** In view of Rem. & Bal. Code, § 6313, providing for contesting the validity of local option elections and conferring upon the superior court final jurisdiction to determine the merits, a judgment of the superior court dismissing an

INTOXICATING LIQUORS—CONTINUED.

action to declare a local option election null and void cannot be reviewed on the merits in the supreme court by a writ of certiorari. *State ex rel. McCallum v. Superior Court*..... 144

3. **SAME—CONTEST OF ELECTION—COURTS—JURISDICTION.** As a local option election affects the public and not private interests, and determination of contests belongs to the political rather than the judicial branch of the government, the legislature has the power to confer final jurisdiction of election contests upon the superior court, notwithstanding the constitutional provision vesting in the supreme court the power to issue writs of review. *State ex rel. McCallum v. Superior Court* 144

4. **INTOXICATING LIQUORS—CONTRACTS—VALIDITY—PUBLIC POLICY—AIDING IN EVASION OF LAW.** Under Rem. & Bal. Code, § 6282, making it unlawful for a brewing company to pay, advance, or loan or become surety for the payment of a retail liquor license, a promissory note by the retailer, payable to a bank, and delivered to a brewing company, which solicited from the bank a loan thereon to pay the retailer's license fee, is void as against public policy and unenforceable, where the bank had notice of the purpose of the loan and made the same on the security of the brewing company with a view of assisting in the evasion of the statute. *Lewer v. Cornelius*..... 124

INVENTORY:

Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 1.

IRRIGATION:

Condemnation of property for public use, see **EMINENT DOMAIN**, 3-5
Use of waters for, see **WATERS AND WATER COURSES**, 4-8.

ISLANDS:

Rights of owners of abutting lands, see **NAVIGABLE WATERS**, 5; **PUBLIC LANDS**.

ISSUES:

In civil actions, see **PLEADING**, 5.

JOINT TENANCY:

See **TENANCY IN COMMON**.

JOINT TORT FEASORS:

See **MASTER AND SERVANT**, 14, 15.

Harmless error in granting nonsuit as to one, see **APPEAL AND ERROR**, 20.

JUDGES:

Comment on facts, see **CRIMINAL LAW**, 4-6.

JUDGMENT:

Review, see **APPEAL AND ERROR**.

Modification of on appeal, see **APPEAL AND ERROR**, 5.

Conclusiveness on appeal, see **APPEAL AND ERROR**, 23.

Condemnation proceedings, see **EMINENT DOMAIN**, 5.

Against minor husband for desertion and nonsupport, see **HUSBAND AND WIFE**, 7.

Against husband on community debt as claim against community estate on death of wife, see **HUSBAND AND WIFE**, 9.

Form of in action against husband and wife on community debt, see **HUSBAND AND WIFE**, 10.

In action by landlord on indemnity bond, see **INDEMNITY**.

Prayer for personal judgment in first action as waiver of right to foreclose other of separate mortgages, see **MORTGAGES**, 3.

In action to restrain issuance of funding bonds, see **MUNICIPAL CORPORATIONS**, 26.

1. **JUDGMENT—ACTION TO SET ASIDE—PLEADING.** An allegation in a complaint to set aside a judgment that plaintiff believes the judgment creditor to be a fictitious person, is neutralized by an allegation that he is a resident of the county. *Kelley v. Sakai*..... 364
2. **SAME.** The denial of a motion to vacate a default judgment is *res judicata* and a bar to an action to set aside the judgment on the ground that the plaintiff was a fictitious person; since the objection goes to the merits of the case. *Kelley v. Sakai*..... 364
3. **JUDGMENT—DECREE IN PROBATE—CONCLUSIVENESS—COLLATERAL ATTACK.** An erroneous decree in probate by a court having jurisdiction, admeasuring dower, not appealed from, fixes the widow's interest and is conclusive, and cannot later be collaterally attacked by grantees of the widow claiming that she owned a half interest in fee under the community property laws. *McDowell v. Beckham*. 224
4. **JUDGMENT—RES JUDICATA—MATTERS CONCLUDED.** A judgment in condemnation proceedings for the purpose of ascertaining the amount of damages to abutting property by reason of a change of street grade is *res judicata* and a bar to a subsequent suit by a party thereto to recover damages therefor. *Johnson v. Spokane*..... 298
5. **JUDGMENT—RES JUDICATA—BAR—MATTERS CONCLUDED—DENIAL OF MOTION TO VACATE.** An order denying a motion to vacate a judgment for want of service of process, for the reason that an order on a previous similar motion had finally disposed of the matter, is *res judicata* and a bar to a subsequent action to set aside the judgment for want of service of process. *Kelley v. Sakai*..... 364
6. **JUDGMENTS—PERSONS AND MATTERS CONCLUDED—LAW OF THE CASE.** Where, in an action against a city and a contractor, for damages to property through the filling up of low land under the police power,

JUDGMENT—CONTINUED.

a nonsuit was granted as to the city, and no appeal was taken therefrom, a judgment against the contractor cannot be sustained on the theory that there was a taking or damaging of property without compensation first paid as required by Const., art. 1, § 16; since the nonsuit as to the city became the law of the case on that point. *Kaler v. Puget Sound Bridge & Dredging Co.*..... 497

JUDICIAL NOTICE:

Of admissions on former appeal, see **APPEAL AND ERROR**, 16.

JUDICIAL SALES:

On execution, see **EXECUTION**.

JURISDICTION:

Appellate jurisdiction, see **APPEAL AND ERROR**, 1, 2.

To recall remittitur, see **APPEAL AND ERROR**, 25.

Of local option election contests, see **INTOXICATING LIQUORS**, 2, 3.

Equitable jurisdiction to reform lease for mutual mistake, see **REFORMATION OF INSTRUMENTS**, 2.

Of courts to review order of school board discharging teacher, see **SCHOOLS AND SCHOOL DISTRICTS**, 4.

JURY:

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 4-6, 8, 9.

Right to jury trial to ascertain damages, see **EMINENT DOMAIN**, 4.

Instructions in civil actions, see **TRIAL**, 6-10.

1. **JURY—COMPETENCY—BIAS — CHALLENGE — EVIDENCE — SUFFICIENCY.**

The fact that a juror considered the arrest of the accused as a "suspicious circumstance" does not subject him to a challenge for actual bias, where it appears that he meant that there were circumstances justifying the officers, in their opinion, in making the arrest, and that he realized a man could be arrested without being guilty, and would not convict unless the state proved his guilty beyond a reasonable doubt. *State v. Cohen*..... 109

KNOWLEDGE:

Of owner as to diseased condition of horse, see **ANIMALS**.

As affecting assumption of risks by servant, see **MASTER AND SERVANT**, 16, 17.

LACHES:

Effect in equity, see **EQUITY**.

Of remainderman in asserting title, see **REMAINDERS**, 1.

LAMPS:

Use of safety lamps in coal mines, see **MINES AND MINERALS**, 1, 2.

LANDLORD AND TENANT:

Execution of lease by corporation to president, see **CORPORATIONS**, 9.

Recovery by landlord in action on indemnity bond, see **INDEMNITY**.

Life tenants, see **LIFE ESTATES**.

Reforming lease for mutual mistake, see **REFORMATION OF INSTRUMENTS**, 2, 3.

Taxation of leasehold interest in state lands, see **TAXATION**, 1.

1. **LANDLORD AND TENANT—SUBTENANTS—ATTORNMEN—RIGHTS OF SUBLESSEES—CONSIDERATION FOR ASSIGNMENT.** Where a lessor ratified an assignment of a lease by accepting attornment from the sublessees, and was willing that the court should decide as to who were his tenants, he is estopped to deny the right of the sublessees to attorn under the lease; hence they cannot defend an action for the purchase price of the lease by asserting failure of consideration and failure to procure an assignment of the lease. *D'Ambrosio v. Nardone*..... 172
2. **LANDLORD AND TENANT—IMPROVEMENTS BY TENANT—COMPENSATION—CONVERSION.** Under a lease of county property giving the tenant a right to remove improvements if the lease is terminated on 60 days' notice, and providing for two years' renewal if the property be not required for immediate use by the county, in which case the improvements were to be appraised by arbitrators and paid for at the appraised value, the tenant is entitled, upon holding over during the two-year renewal period without notice of termination having been given, to recover the appraised value of the improvements at that time, converted by the county upon refusing to arbitrate the appraisal or to allow the improvements to be removed. *Coliseum Investment Co. v. King County*..... 687
3. **SAME—IMPROVEMENTS BY TENANT—COMPENSATION—CONVERSION—MEASURE OF DAMAGES.** Where a lease provided that improvements by the tenant should be appraised and paid for, and the landlord converted the same at the termination of the lease, and thereafter leased the same and collected rents, the measure of damages is the value of the improvements for rental purposes at the termination of the lease, and the use to which they were put may be considered; but it is error to give judgment for the rents collected. *Coliseum Investment Co. v. King County*..... 687
4. **LANDLORD AND TENANT—CONTRACT FOR BUILDING—CONSTRUCTION—REPAIRS.** Where defendant agreed to construct a building and lease it to the plaintiff, who was to keep it in repair, and the building as constructed was leaky and defective and plaintiff only took possession under defendant's promise to remedy the defect and put it in proper shape, the plaintiff is not called upon to repair the building, and did not waive full performance by taking possession under defendant's promises. *Shigeta v. Gaffney Investment Co.*..... 221

LANDLORD AND TENANT—CONTINUED.

5. **LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—WAIVER.** A constructive eviction by an unlawful interference with the lessee's subtenant is waived where the lessee does not surrender the premises. *Tennes v. American Building Co.*..... 644
6. **SAME—LEASE—BREACH BY LANDLORD — DAMAGES — EVIDENCE — ADMISSIBILITY.** Where a landlord unlawfully interfered with the lessee's subtenant, causing a loss of the rent under the sublease, the sublease is not admissible in evidence to prove the damages, inasmuch as gains or profits of collateral subcontracts cannot be recovered for breach of the original contract, where the subcontract was made after the execution of the original contract. *Tennes v. American Building Co.*..... 644
7. **LANDLORD AND TENANT—UNLAWFUL DETAINER—ACTION ON BOND—DEFENSES—SURRENDER.** The defendant in an action of unlawful detainer did not voluntarily surrender the premises, so as to preclude action on the bond for restitution, where she failed to have entered an order increasing the plaintiff's bond, after the court had granted a motion therefor, and the plaintiff took advantage of the situation, stood upon the bond already given, and directed execution of the writ, whereupon the defendant moved out under the threat that her goods would be thrown into the street. *Corman v. Sanderson*... 627
8. **SAME—UNLAWFUL DETAINER—ACTION ON BOND—PRIMA FACIE CASE.** In an action upon a bond for restitution given in an unlawful detainer action, the fact that the plaintiff in unlawful detainer voluntarily dismissed his action is *prima facie* sufficient to show that the writ was wrongfully sued out; and authorizes a recovery where it was further shown that plaintiff was in possession under a lease from one authorized to make it. *Corman v. Sanderson*..... 627
9. **SAME—LIABILITY ON BOND—ELEMENTS OF DAMAGE.** In an action upon a bond for restitution, given in an unlawful detainer action in which the tenant was ousted of possession, the plaintiff may recover as elements of damage the amount of advance rents paid, damages on account of the removal, and attorney's fees paid for successfully defending the unlawful detainer action. *Corman v. Sanderson*.... 627

LANDS:

See PUBLIC LANDS.

LARCENY:

By bunco game, sufficiency of information, see INDICTMENT AND INFORMATION, 1.

1. **LARCENY—BY TRICK OR "BUNCO GAME"—EVIDENCE—SUFFICIENCY.** A conviction of grand larceny, by means of a trick, device or "bunco game," under Rem. & Bal. Code, § 2601, subd. 2, is sustained, although the game played was an innocent game of skill, where it appears that the prosecuting witness was induced by three confederates to

LARCENY—CONTINUED.

engage in a game of bocce with a reputed stranger as an adversary, who was skilled in the game, that he was allowed to win a few games, his measure taken, and then induced to play for \$3,000, the confederates pretending to contribute \$5,000 towards a pretended \$8,000 stake, and that they never intended to allow him a chance to win, but stole and divided up his \$3,000 before the game was over; any game, whether innocent or not, being a "bunco game" if it is the design and conduct of those using it to give it that character. *State v. Ferrato*..... 112

2. **LARCENY—BY FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY.** A conviction of grand larceny by false representations is sustained where it appears that the accused represented that he had three hundred tons of potatoes, which he thereupon sold under an agreement to ship them from week to week, that he received as first payment a check for \$500, cashed the same and left the state, and when arrested admitted that he did not have any potatoes. *State v. Grune*..... 448

LAW OF THE CASE:

See **APPEAL AND ERROR**, 24; **JUDGMENT**, 6.

LEASES:

See **LANDLORD AND TENANT**.

LEAVE TO SUE:

See **RECEIVERS**, 2.

LEGISLATIVE POWER:

Division of counties and apportionment of assets, see **COUNTIES**, 2.
Delegation of to electors of local option units, see **INTOXICATING LIQUORS**, 1.

LICENSES:

Validity of act prohibiting manufacturer from paying retail liquor license, see **CONSTITUTIONAL LAW**.
Payment of corporate license fee, see **CORPORATIONS**, 11-13.
Illegal contract to pay retail liquor license, see **INTOXICATING LIQUORS**, 4.

LIENS:

See **MECHANICS' LIENS**.
Mortgage, see **MORTGAGES**.
For services, see **WORK AND LABOR**, 1.

LIFE ESTATES:

1. **LIFE ESTATES—ADVERSE POSSESSION—HOSTILE POSITION—LIFE TENANT—RIGHTS OF REMAINDERMAN.** Remaindermen are not bound to

LIFE ESTATES—CONTINUED.

assert their title during the lifetime of the life tenant, and adverse possession under the ten-year statute of limitations, Rem. & Bal. Code, § 156, cannot be claimed, as against them, under a deed from the life tenant purporting to convey the fee. *McDowell v. Beckham*..... 224

2. **LIFE ESTATES—ADVERSE POSSESSION—ACTS CONSTITUTING—CUTTING TIMBER.** Cutting timber by a life tenant is not necessarily an act of possession, but is usually an act of waste. *McDowell v. Beckham* 224

3. **LIFE ESTATES—ADVERSE POSSESSION—"TITLE."** One claiming title under a deed of the fee from the life tenant cannot hold adversely to the remaindermen, under Rem. & Bal. Code, § 786, the seven-year statute of limitations for the recovery of lands held adversely under title in law or equity; "title" as there employed meaning a fee simple and not a limited fee. *McDowell v. Beckham*..... 224

4. **LIFE ESTATES—ADVERSE POSSESSION—CLAIM AND COLOR OF TITLE—GOOD FAITH.** The payment of taxes for seven years under color and claim of title in good faith, within Rem. & Bal. Code, § 789, cannot be asserted, as against remaindermen, under a deed from the life tenant purporting to convey the fee, as the claim cannot be asserted in good faith. *McDowell v. Beckham*..... 224

5. **LIFE ESTATES—ADVERSE POSSESSION—PAYMENT OF TAXES.** It being the duty of a life tenant to pay taxes, he cannot assert title against remaindermen by the payment of taxes under the seven-year statute of limitations. *McDowell v. Beckham*..... 224

LIFE TENANTS:

See **LIFE ESTATES**.

LIMITATION:

Of municipal indebtedness, see **MUNICIPAL CORPORATIONS**, 24-26.

LIMITATION OF ACTIONS:

On insurance policy, waiver, see **INSURANCE**, 2.

Time for asserting remainder interest, see **REMAINDERS**.

1. **LIMITATION OF ACTIONS—SEDUCTION—ACCRUAL — DISABILITIES — MINORITY.** Since, under Rem. & Bal. Code, § 186, only females over twenty-one years of age may maintain an action for their own seduction, the right of action for seduction while a minor accrues to her when she becomes twenty-one years of age; and not at the age of majority, eighteen years, under § 8743; and the action must be commenced within three years after becoming twenty-one, under § 159, requiring an action for seduction to be begun within three years after the cause accrues, and § 169, providing that, if the person entitled to bring an action be under twenty-one when the cause accrues, the time of the disability shall not be a part of the time limited. *Gates v. Shaffer*..... 451

LIQUIDATED DAMAGES:

Recovery by landlord in action on bond, see **INDEMNITY**.

LIS PENDENS:

Pendency of other action ground for abatement, see **ABATEMENT AND REVIVAL**, 1.

LOCAL OPTION:

See **INTOXICATING LIQUORS**, 1-3.

LOGS AND LOGGING:

Use of stream for floating timber products, see **NAVIGABLE WATERS**, 1-4.

LOST INSTRUMENTS:

Parol testimony to prove lost writing, see **EVIDENCE**, 3.

MACHINERY:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 24.

MAJORITY:

Determining majority vote at municipal bond election, see **ELECTIONS**.

MALPRACTICE:

See **PHYSICIANS AND SURGEONS**.

Opinions of experts as to medical treatment, see **EVIDENCE**, 4.

MARRIAGE:

See **HUSBAND AND WIFE**.

1. **MARRIAGE—ANNULMENT—POWER OF COURTS—CONSTITUTIONAL LAW—CIVIL RIGHTS—INFRINGEMENT.** The superior court has no power, in an action for the annulment of a marriage, to order the parties to meet for a conference, with a view to adjusting their differences, as it would be an infringement of personal rights. *State ex rel. Waughop v. Superior Court*..... 535

MASTER AND SERVANT:

Injury to servant employed in interstate commerce, see **COMMERCE**.
Evidence of service of notice of injury under factory act, see **EVIDENCE**, 2.

Liens for labor and materials, see **MECHANICS' LIENS**.

Employees of municipal corporations, see **MUNICIPAL CORPORATIONS**, 2-5.

Action for personal services, see **WORK AND LABOR**.

1. **MASTER AND SERVANT—INDUSTRIAL INSURANCE—DEPENDENTS—STATUTES—CONSTRUCTION.** Under the industrial insurance act, Laws 1911, p. 357, § 5, sub. 3, providing for a monthly payment to a dependent of a deceased workman, not exceeding \$20 a month, and that, if the

MASTER AND SERVANT—CONTINUED.

- workman is under age and unmarried, the parents shall receive \$20 per month for each month until the time of his majority, a parent who is also dependent is entitled to the monthly payment during the continuance of dependency, and not merely to the time of majority; the latter provision being intended for nondependent parents. *Boyd v. Pratt*..... 306
2. **SAME—APPEALS—ATTORNEY'S FEES.** Under § 20 of the industrial insurance act (Laws 1911, p. 368), providing that on appeal from the decision of the department, the court, shall fix a reasonable attorney's fee, and for appeals from the superior court to the supreme court as in other civil cases, the power to allow attorney's fees is limited to the superior court. *Boyd v. Pratt*..... 306
3. **MASTER AND SERVANT—RELATION—EXISTENCE OF AGENCY—EVIDENCE QUESTION FOR JURY.** The question of the agency of an employee of the owner of a grocery store, rendering the employer liable for injuries sustained when the employee, driving an automobile delivery truck, ran into and injured a pedestrian, is for the jury, where it appears that the automobile started out on a demonstration trip in charge of the selling agent, to make a delivery of groceries, and there was evidence that the groceryman instructed the agent to show the employee how to run the machine, and "all about it," as he was "the man who would run it" if purchased. *Hammons v. Setzer*..... 550
4. **SAME—SAFE PLACE TO WORK—COAL MINE—DUTY OF INSPECTION.** Where coal miners were expected to work up to the line of a chute, which they were not to enter or inspect, it is the continuing duty of the master to inspect and keep such adjacent space in a safe condition. *Gennaux v. Northwestern Imp. Co.*..... 268
5. **MASTER AND SERVANT—SAFE PLACE—GAS IN COAL MINE—NEGLIGENCE—VIOLATION OF STATUTE—EVIDENCE—SUFFICIENCY.** In an action by a coal miner for injuries sustained in a gas explosion, plaintiff's statement that, if there had been enough air, the gas would not have accumulated in his working place, is a mere conclusion, and not sufficient evidence of negligence or of defendant's failure to comply with Rem. & Bal. Code, § 7381, requiring good ventilation and sufficient circulating air. *Dollar v. Northwestern Imp. Co.*..... 1
6. **MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** Evidence that an employee on a box car on a side track fell when "the roof felt like it went out," that something hit the car and what he was standing on "went out," and that an engine kicking cars might have hit it, and of another witness that something hit the train and jarred it, is not sufficient evidence to sustain a recovery on the theory that the box car was violently hit by an engine, there being no evidence that any engine was in the vicinity; since recovery cannot be based on speculation and conjecture. *Pearson v. Northern Pac. R. Co.*..... 8

MASTER AND SERVANT—CONTINUED.

7. MASTER AND SERVANT—INJURY TO SERVANT—FALL OF OVERHEAD ROCK IN COAL MINE—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. The negligence of the master in failing to provide a safe working place in a coal mine is for the jury, where it appears that a miner was injured by the fall of a great quantity of overhead rock, all of which could not have come from his own roof, but it could have come from, and there was evidence of a fall of rock in, an adjacent chute, which was admitted to be in bad condition. *Gennaux v. Northwestern Imp. Co.*..... 268
8. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE TO WORK—EVIDENCE—SUFFICIENCY—ASSUMPTION OF RISK. An action by a workman employed in piling up cement bags, for injuries sustained through the fall of a pile of bags, alleged to have been "piled too high" and in a negligent manner, must fail in the absence of any evidence to show the cause of the fall, or that the pile was improperly piled, especially where the plaintiff was experienced and might have assumed the risk of a dangerously high pile. *Samardege v. Hurley-Mason Co.*..... 459
9. MASTER AND SERVANT—SAFE PLACE—BRIDGE CONSTRUCTION—NEGLIGENCE—QUESTION FOR JURY. The negligence of a city in failing to properly support a temporary arch for a bridge is for the jury, where witnesses testified that it "buckled" or "listed," and leaned upstream six to eighteen inches, that it was an efficient barrier to the wind, and that the wind which caused the fall was not unusual or unprecedented. *Wolpers v. Spokane*..... 562
10. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—CHANGING CONDITIONS—TEARING DOWN BUILDINGS—METHODS OF WORK—QUESTION FOR JURY. The doctrine of safe place to work applies to the tearing down of old buildings, where the master does not exercise reasonable care, considering the nature of the work, to eliminate unnecessary dangers, or injects unnecessary dangers into the work or place; and his negligence is for the jury, where it appears that his foreman, of thirty years' experience, directed an inexperienced man to pull down with a hand line the remnants of a roof upon a floor upon which the man was standing, without making an inspection of the floor, and by a method which caused part of a heavy wall to fall upon the floor, causing it to give way, when the danger could have been obviated by removing the man and using a cable and team ordinarily used for such purposes. *Rogers v. Valk*..... 579
11. MASTER AND SERVANT—SAFE PLACE—COAL MINE—EVIDENCE—QUESTION FOR JURY. Where miners were required to follow their cars down an incline, without sufficient light, where depressions were constantly forming between the rails, so that when a co-employee stumbled and lost his hold on a car, it ran down the incline upon the plaintiff and injured him, the questions as to the reasonable

MASTER AND SERVANT—CONTINUED.

- safety of the place and sufficient inspection are for the jury. *LaOaff v. Roslyn-Cascade Coal Co.*..... 668
12. MASTER AND SERVANT—INJURY TO SERVANT—CAUSE OF ACCIDENT—*RES IPSA LOQUITUR*. In an action for injuries through the fall of a pile of cement bags injuring a workman engaged in piling bags, the doctrine of *res ipsa loquitur* does not apply, where there was nothing to indicate whether the fall was due to negligent piling or the act of a fellow servant. *Samardege v. Hurley-Mason Co.*..... 459
13. SAME—FELLOW SERVANTS—COAL MINES—EMPLOYEES IN ADJACENT WORKINGS. No question of the negligence of fellow servants is involved, where an employee was injured through failure to inspect and keep a working place safe. *Gennaux v. Northwestern Imp. Co.*..... 268
14. SAME—JOINT TORT FEASORS—MASTER AND MINE FOREMAN. A foreman, having direct supervision of a mine, who knew of dangerous conditions and took no step to remedy them, is guilty of negligence as a joint tort feasor with the company, and both may be joined in one action. *Gennaux v. Northwestern Imp. Co.*..... 268
15. SAME—MASTER AND GENERAL SUPERINTENDENT—DUTY AND NOTICE. A general superintendent of a mine having no duty of personal inspection of the underground workings and no actual knowledge of a dangerous condition, known only to the fire boss and mine foreman who did not report it, is not liable with the company as a joint tort feasor. *Gennaux v. Northwestern Imp. Co.*..... 268
16. MASTER AND SERVANT—ASSUMPTION OF RISKS—NOTICE OF DANGER. A longshoreman did not, as a matter of law, assume the risks in working near an improvised conveyor chute loading flour, which he had assisted in substituting for a regular chute because of a lumber-pile requiring a change, where there was nothing to indicate the faulty construction of the substituted chute, or to give notice that because of failure to fasten it at the lower end it would gradually work back and cause the accident, the foreman who directed the work not apprehending any danger. *Elanius v. Rothschild.*.... 152
17. SAME—SAFE PLACE—COAL MINE—ASSUMPTION OF RISKS—UNKNOWN DANGERS. A coal miner does not assume the risks of dangers in adjacent works not under his control or subject to his inspection, and of which he had no knowledge, and which were not due to changing conditions, but to a "squeeze" known to the fire boss and the foreman, neither of whom gave any notice or warning thereof. *Gennaux v. Northwestern Imp. Co.*..... 268
18. SAME—ASSUMPTION OF RISKS. A workman on a city bridge does not assume the risks of changing conditions requiring engineering oversight and due to outside causes, as a high wind and listing, as distinguished from those incidental to the work itself. *Wolpers v. Spokane.*..... 562

MASTER AND SERVANT—CONTINUED.

19. SAME—ASSUMPTION OF RISKS—QUESTION FOR JURY. A workman without experience does not assume the risks, and is not guilty of contributory negligence, as a matter of law, in obeying the direct command of the foreman to pull down the remnants of a roof upon a floor upon which he was standing; the floor being supported on three sides by brick walls and also by a chimney, and there being no evidence that there was a safer place for him to stand and do the work; since the added danger was not so open, obvious and imminent that a reasonably prudent man would not have obeyed the order, nor that injury must necessarily result from obedience. *Rogers v. Valk*..... 579
20. SAME—ASSUMPTION OF RISKS—QUESTION FOR JURY. A coal miner, required to follow cars down an incline, does not, from his knowledge of the general condition of the ground, assume the risks of a co-employee stumbling in a depression and losing control of a car which came down upon him, where it was the duty of the track man to make a daily inspection of the track. *LaCaff v. Roslyn-Cascade Coal Co.*..... 668
21. SAME—CONTRIBUTORY NEGLIGENCE. Evidence that the roof over a miner's room fell, does not establish his contributory negligence in placing props, as a matter of law, where the cause of the fall was a question for the jury. *Gennaux v. Northwestern Imp. Co.*..... 262
22. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of an employee is for the jury, where there was evidence that an elevator started automatically and was running away, when, in order to save himself, he grasped the wrong cable and his hand was drawn into the drum. *Villani v. Washington Brick, Lime and Sewer Pipe Co.* 560
23. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such a case, a miner is not guilty of contributory negligence, as a matter of law, in making a customary stop without looking back, to put an extra brake on his car, which was apparently necessary by reason of a change in the grade of the incline. *LaCaff v. Roslyn-Cascade Coal Co.* 668
24. MASTER AND SERVANT—INJURY TO SERVANT—UNGUARDED SAW—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE. Contributory negligence is not the proximate cause of an injury sustained on a saw which was not guarded as required by the factory act, where the plaintiff was operating the saw in the usual manner and would not have been injured if it had been properly guarded. *Mathis v. Western Furniture Mfg. Co.*..... 206
25. SAME—PLEADINGS, ISSUES AND PROOF—"OBSTRUCTIONS" ON TRACK. Under an allegation of negligence in allowing "obstructions" be-

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tween the rails of a track in a coal mine, which caused a miner to stumble and lose control of a car, it is admissible to prove a "depression" between the rails. *LaCaff v. Roslyn-Cascade Coal Co.* 668

MATERIALS:

Sale and delivery of, see **MECHANICS' LIENS**, 1.

MEASURE OF DAMAGES:

See **DAMAGES**.

For wrongful death of infant, see **DEATH**.

For conversion of improvements by landlord, see **LANDLORD AND TENANT**, 3.

For conversion of house, see **TROVER AND CONVERSION**, 1.

MECHANICS' LIENS:

1. **MECHANICS' LIENS—SALE AND DELIVERY OF MATERIALS—EVIDENCE—SUFFICIENCY.** A finding that materials for a building were furnished to the contractor as an independent contractor, are sustained where both contractor and owner testified that such relation was fully disclosed, and they were corroborated by the bills sent out with the material. *Johnson v. Heirgood*..... 120
2. **SAME—MATERIALS—DUPLICATE STATEMENTS—NECESSITY.** It is not a compliance with Rem. & Bal. Code, § 1133, requiring a person furnishing materials to a contractor for the construction of a building to mail or deliver duplicate statements to the owner of all such materials as a condition precedent to a mechanics' lien, for the driver of the wagon to deliver to the person on the grounds receiving the material duplicate statements of the contents of the loads, one of which was to be signed and returned as evidence of the delivery. *Johnson v. Heirgood*..... 120
3. **SAME—WAIVER.** In such a case, the owner does not waive the statute by reason of the fact that, when one of the first loads was delivered, he declined to accept or sign the driver's statements or receipts, but referred him to the contractor, none of the parties treating such receipts as the notices contemplated by the statute. *Johnson v. Heirgood*..... 120
4. **SAME.** Such statute is not waived by the fact that the owner had actual notice of the delivery of the material, and frequently inspected it, and caused part of it to be rejected. *Johnson v. Heirgood*..... 120
5. **MECHANICS' LIENS—FORECLOSURE—RELATIONSHIP — ALLEGATION AND PROOF—NECESSITY.** The complaint or proof in an action to foreclose a materialman's lien must show the relationship between the owners of the property and the persons ordering or contracting for the materials furnished, under Rem. & Bal. Code, § 1129, requiring that the materials be furnished either at the instance of the owner, or his agents or contractors, architects, builders, or persons having charge of the construction. *Belknap Glass Co. v. Kelleher*..... 529

MEMORANDA:

Required by statute of frauds, see **FRAUDS, STATUTE OF.**

MENTAL SHOCK:

Evidence of in action for injuries, see **EVIDENCE, 1.**

METHOD OF WORK:

See **MASTER AND SERVANT, 10.**

MINES AND MINERALS:

Employees in mines, see **MASTER AND SERVANT, 4, 5, 7, 11, 13-15, 17, 20, 21, 23, 25.**

1. **MINES AND MINING—USE OF SAFETY LAMPS IN COAL MINES—STATUTES—CONSTRUCTION.** Rem. & Bal. Code, § 7400, providing that only safety lamps shall be allowed or used in every working place of a coal mine where there is likely to be an accumulation of explosive gases or imminent danger therefrom, does not require the use of safety lamps where there had been no indication of gases until the instant of the accident, and where there was no evidence that there was likely to be an accumulation of explosive gases or imminent danger therefrom. *Dollar v. Northwestern Imp. Co.*..... 1
2. **SAME—USE OF SAFETY LAMPS—EVIDENCE—ADMISSION BY COUNSEL.** In an action for injuries sustained in a gas explosion in a coal mine, through failure to use safety lamps in working places where there was likely to be an accumulation of explosive gases, a retort by counsel during the trial that the mine was a gaseous mine, and that gas was likely to come quickly in some parts of it, is not an admission that will avail the plaintiff, in the absence of evidence that there was likely to be an accumulation of gases at the point in question. *Dollar v. Northwestern Imp. Co.*..... 1
3. **MINES AND MINERALS — SALES — OPTION TO RESCIND — REASONABLE TIME—NOTICE—SUFFICIENCY.** A contract to return the purchase price of mining property "at the end of three years," if the purchaser is dissatisfied, allows a reasonable time after the expiration of the three years to give notice of dissatisfaction; and a notice is timely where it was, within two months, mailed to the party's address, where his family resided, two weeks prior to his expected return from the interior of Alaska where he had been for some time. *McDougall v. O'Connell*..... 349
4. **SAME—OPTION TO RESCIND—CONSTRUCTION.** Under an agreement to return the purchase price of mining property, within a limited time if the purchaser "is dissatisfied" with the property, he need not show reasonable grounds for his dissatisfaction. *McDougall v. O'Connell* 349
5. **SAME—OPTION TO RESCIND—CONDITION PRECEDENT.** Under an agreement to return the purchase price of mining property, at the end of

MINES AND MINERALS—CONTINUED.

three years, if the purchaser is dissatisfied, "he keeping up his share of the assessment work," failure to meet the assessment for the last year does not forfeit the purchaser's right to rescind, where no demand was made upon him for the payment of his portion, and assessments for the two previous years had not been met until the work was done and request for payment made; no assessment work having been done the last year. *McDougall v. O'Connell*..... 349

MINORS:

Nonsupport by minor husband, see **HUSBAND AND WIFE**, 2, 7; **INFANTS**.

Effect of minority on limitations, see **LIMITATION OF ACTIONS**.

MISREPRESENTATION:

Larceny by false representations, see **LARCENY**, 2.

Inducing sale, see **SALES**, 1.

By cotenant, see **TENANCY IN COMMON**, 2.

MISTAKE:

Ground for relief in equity, see **EQUITY**.

Ground for reformation of instrument, see **REFORMATION OF INSTRUMENTS**.

MODIFICATION:

Of judgment on rehearing, for waiver of rights pending appeal, see **APPEAL AND ERROR**, 5.

MONEY LENT:

1. **MONEY LOANED—EVIDENCE—SUFFICIENCY.** The fact that plaintiff's decedent remitted a check to the defendant does not create a presumption that the money was loaned, and an implied promise to repay is not thereby created and will not be found from the fact that decedent in her lifetime commenced an action to recover the same, where defendant's contention that it was to repay advances and for services rendered was supported by the testimony of several persons who were witnesses to the transactions. *Pyle v. Starbird*..... 386

MONEY RECEIVED:

Remedies against receiver for wrongful possession of warrant, see **RECEIVERS**, 1.

MORTGAGES:

1. **MORTGAGES—ABSOLUTE DEED AS MORTGAGE—TRUST—EVIDENCE—SUFFICIENCY.** A deed absolute in form is properly held to have been given as security for a debt, and not in trust for the grantor, where it appears to have been given pursuant to a demand for additional security, the grantor signed a statement so reciting, and his evi-

MORTGAGES—CONTINUED.

dence in support of an alleged trust showed an intent on his part to defraud creditors, which was not communicated by the agent to the grantee. *Scandinavian American State Bank v. Downs*..... 79

2. **MORTGAGES—FORECLOSURE—VENUE—SEPARATE MORTGAGES—ELECTION—WAIVER.** Separate mortgages given upon land in separate counties, each securing a specific portion of one promissory note, are not given to secure the same debt, for the purposes of foreclosure, where a personal judgment is not sought, since the separation for the purposes of foreclosure makes each a separate debt and foreclosure thereof local to the county in which the land is situated; hence a foreclosure of one mortgage in one county does not waive the right to foreclose the other in a separate action. *Citizens Nat. Bank v. Abbott*..... 73
3. **SAME—FORECLOSURE OF SEPARATE MORTGAGES—COMPLAINT—PRAYER FOR PERSONAL JUDGMENT—ABANDONMENT—EFFECT.** In such case, a prayer for personal judgment in the first action does not waive the right to foreclose the other mortgage, where such prayer was abandoned with a view of prosecuting the second suit, and no personal judgment was entered. *Citizens Nat. Bank v. Abbott*..... 73
4. **SAME—DECREE—RES JUDICATA.** A personal judgment on a note secured by mortgage, is not *res judicata* or a bar to a subsequent action to foreclose the lien of the mortgage. *Citizens Nat. Bank v. Abbott* 73

MOTIONS:

Opening or vacating judgment, see **JUDGMENT**, 2.
 Direction of verdict in civil actions, see **TRIAL**, 5.

MUNICIPAL CORPORATIONS:

Liability for unsafe condition of city bridge, see **BRIDGES**.
 Rejection and count of ballots to determine majority vote at bond election, see **ELECTIONS**.
 Damaging of property by grade of street, see **EMINENT DOMAIN**, 2.
 Injury to workman on city bridge, see **MASTER AND SERVANT**, 9, 18.
 Street railroads, see **STREET RAILROADS**.

1. **MUNICIPAL CORPORATIONS—CHARTERS—POWERS—STATUTES—IMPLIED REPEAL—STREET RAILWAYS—FRANCHISES.** Laws 1911, p. 54, §§ 1-3, providing that the form of the organization and the manner and mode in which cities of the first class shall exercise powers "with respect to their own government" shall be as provided in their charters, and authorizing direct legislation "within the scope of such powers" by the initiative and referendum, does not impliedly repeal Rem. & Bal. Code, § 9080, conferring upon the mayor and council the power to grant franchises; since the power to grant franchises is a sovereign power which may be delegated by the state and is not within the act of 1911 relating to powers exercised by cities, "with

MUNICIPAL CORPORATIONS—CONTINUED.

- respect to their own government." *Dolan v. Puget Sound Traction, Light & Power Co.*..... 343
2. **MUNICIPAL CORPORATIONS—OFFICERS—CIVIL SERVICE REGULATIONS—REMOVAL—POWER TO DISCONTINUE OFFICE.** Under § 24 of the Spokane charter providing that the council shall have the power to discontinue all offices and employments except certain enumerated offices, and § 55 providing for the suspension of employees by the heads of departments on filing charges, an office may be "discontinued" only by the council, and an attempted discontinuance by the mayor of the office of sanitary inspector in the health department, who was continued in office at the adoption of the new charter by § 53, is a nullity. *Foster v. Hindley*..... 657
3. **SAME—CHARTER PROVISIONS—ADOPTION—EFFECT ON OFFICERS CONTINUED IN OFFICE.** The adoption of the new city charter of Spokane in 1910 did not discontinue the office of sanitary inspector in the health department, where the new charter only reorganized the department, and by § 53 the new charter provided that employees within the scope of the article (including sanitary inspectors) who are in office at the time of the adoption of the charter shall retain their positions unless removed for cause, and they were afterwards placed in the classified civil service list and made permanent. *Foster v. Hindley* 657
4. **SAME—OFFICERS—SALARY OF WRONGFULLY REMOVED OFFICER.** A sanitary inspector who was wrongfully separated from his office may recover the salary for the period, where he held himself ready to perform his official duties, and it is immaterial that he declined other temporary employment tendered by the city. *Foster v. Hindley*. 657
5. **SAME—OFFICERS—WRONGFUL REMOVAL—REMEDIES—APPEAL TO CIVIL SERVICE COMMISSIONER.** Under § 55 of the Spokane charter providing for the suspension of an officer for cause upon a hearing, and appeal therefrom, an officer removed by subterfuge of an unauthorized "discontinuance" of the office, without a hearing, is not required to appeal. *Foster v. Hindley*..... 657
6. **MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PROCEEDINGS—PETITION—ALTERATION—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to show that a petition for a street improvement had been changed after it was signed, where the testimony to that effect of some of the signers was indistinct and uncertain, and was contradicted by the person who circulated the petition and inconsistent with the ordinances, specifications, contract and all the proceedings, and no objection was made until the contract was substantially completed. *Hutchinson v. Spokane*..... 56
7. **SAME—PROCEEDINGS—ORDINANCE—VARIANCE.** It is not a material variance that an ordinance directed a local improvement to be paid wholly or in part by a special assessment upon property benefited,

MUNICIPAL CORPORATIONS—CONTINUED.

and the judgment recited that the ordinance required the same to be paid for in whole by such assessment, where the board of eminent domain commissioners found that no part of the cost should be borne by the city. *Spokane v. Miles*..... 571

8. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—INITIATING ORDINANCE—AMENDMENT—VESTED RIGHTS. Property owners have no such vested interest in the proceedings initiating a public improvement that the city could not amend the initiatory ordinance prescribing the special assessment district, so as to provide that the district shall be determined by the eminent domain commissioners, according to law, where there is no statute giving the property owners the right to protest against such improvement or to be represented by counsel in the initiatory condemnation proceedings, and the ordinance was amended prior to the notice of the assessment required by law to be given the property owners, who are then given an opportunity to make any objection to the assessment roll. *In re Leary Avenue*..... 617
9. SAME—PRELIMINARY ORDINANCE—AMENDMENT—VALIDITY. An amendment of a specified section of an ordinance initiating a public improvement is not invalid by reason of the fact that such section had been previously repealed, where there was no doubt of its purpose to make the amendment a part of the original law; since an ordinance may be amended by adding a new section, which was the effect of the amendment. *In re Leary Avenue*..... 617
10. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ACTION ON BOND TO SECURE PERFORMANCE. No recovery can be had by a materialman on a contractor's bond given for the security of laborers and materialmen on public work, under Rem. & Bal. Code, § 1159, for ties sold to a contractor on street grading work, where the ties were used for a track to move dirt on three other contracts held by the contractor and not secured by the bond, and the ties were not entirely consumed in the work. *City Retail Lumber Co. v. Title Guaranty and Surety Co.*..... 300
11. SAME—PERFORMANCE OF CONTRACT—ACCEPTANCE—CONCLUSIVENESS. Where a contract for public work has been substantially complied with, the decision to that effect by the board of public works and city engineer, vested with power to determine all questions relating to the performance of the contract, is final and conclusive, in the absence of fraud. *Hutchinson v. Spokane*..... 56
12. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE IN GRADING—LIABILITY OF CONTRACTOR—EVIDENCE—SUFFICIENCY. In an action by a pedestrian against a contractor doing street grading work, for injuries sustained when crossing a cable used in hauling dirt, a nonsuit is properly granted, where it appears that the plaintiff stood near the cable watching the work for about five minutes, and made

MUNICIPAL CORPORATIONS—CONTINUED.

no inquiry of an employee nearby, but stepped across and into the bight of the cable while it was lying idle on the ground, without giving any intimation of his intention to cross, there being nothing to show that defendant had any knowledge or intimation of plaintiff's danger or intention to cross. *Pearson v. Willapa Construction Co.* 487

13. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGE TO PROPERTY—DEFECTIVE PLANS—LIABILITY.** While a city may fill low lands as a sanitary measure without liability for consequential damages suffered by the lands within the district filled, it is liable for injury to abutting property; and when lands originally within the district have, by the engineer having authority to exempt property, been excluded from the district, they became abutting property within the above rule. *Kaler v. Puget Sound Bridge & Dredging Co.*... 497

14. **SAME—DAMAGE TO PROPERTY—DEFECTIVE PLANS—LIABILITY OF CONTRACTOR.** Where a city furnished the plan and directed the work of filling up low lands, and damages to abutting property resulted, not from any negligence or wrongdoing of the contractor, who performed the work in the manner required by the contract, the contractors stand in the relation of agents of the city and not as independent contractors, and the liability rests upon the city and not upon the contractors, who cannot be held after a nonsuit is granted as to the city. *Kaler v. Puget Sound Bridge & Dredging Co.*.... 497

15. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—REVIEW BY COURTS.** An assessment district fixed by commissioners will not be changed by the courts unless the commissioners acted arbitrarily or fraudulently, or upon a fundamentally wrong basis; and not for a mere difference of opinion as to what were the proper limits. *Spokane v. Miles*..... 571

16. **SAME—ASSESSMENT—APPORTIONMENT.** A city need not be charged with part of the cost of a local improvement, where there was no evidence that any special benefit accrued to the city at large. *Spokane v. Miles*..... 571

17. **SAME—AUTOMOBILES—VIOLATION OF SPEED LIMIT—ORDINANCE—CONSTRUCTION.** A person riding a bicycle on a city street crossing is within the protection of a city ordinance fixing the speed limit for automobiles at four miles an hour over city crossings "when any person is upon the same." *Ludwigs v. Dumas*..... 68

18. **MUNICIPAL CORPORATIONS—STREETS—USE—COLLISION BETWEEN AUTOMOBILE AND BICYCLE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** The negligence of the driver of an automobile, and the contributory negligence of plaintiff riding a bicycle, are questions for the jury, where the plaintiff was on a crossing ordinarily used by pedestrians, going in an opposite direction from which he had come a moment before, in plain view and crossing the

MUNICIPAL CORPORATIONS—CONTINUED.

- course of the automobile which was very near and making no noise, and exceeding the city speed limit, so that neither party saw the other in time to avoid the accident. *Ludwigs v. Dumas*..... 68
19. MUNICIPAL CORPORATIONS—STREETS—USE—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is not contributory negligence, as a matter of law, for a pedestrian, about to board a street car, to fail to look for and see an approaching automobile, seventy-five feet away, or to fail to keep a lookout for it while crossing the street, where the pedestrian was in full view of the driver, and there was room for the driver to turn to one side. *Lewis v. Seattle Taxicab Co.*..... 320
20. MUNICIPAL CORPORATIONS—SEWERS—DAMAGES FROM OBSTRUCTION—NEGLIGENCE. A city is not liable for damages to property through the obstruction of a sewer unless negligence on its part be proven. *Vittucci Importing Co. v. Seattle*..... 192
21. SAME—DUTY OF INSPECTION. A city owes the duty of reasonable inspection of its sewers, and its liability for damages to property by reason of obstructions does not depend upon notice to it by the property owner. *Vittucci Importing Co. v. Seattle*..... 192
22. SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The fact that a city sewer became obstructed, and overflowed and caused damage to property, and that there existed no extraordinary conditions such as floods or freshets, establishes a *prima facie* case of negligence against the city, and casts the burden on it of showing that it had exercised ordinary care in performing its duty of inspection. *Vittucci Importing Co. v. Seattle*..... 192
23. MUNICIPAL CORPORATIONS—WATER MAINS—DAMAGES—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for damages from water escaping from a city main, there is sufficient evidence of the negligence of the city, where it appears that a terminal of considerable dimensions was closed by a cap held by braces carried back some distance to an embankment of earth, that service pipes near the end were subsequently put in, and not made water tight, and escaping water loosened the earth and caused the cap to give way under the pressure of the water. *Seattle & Puget Sound Packing Co. v. Seattle* 359
24. MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMITATIONS—DEBTS SUBJECT—UNNECESSARY EXPENSES. Const., art. 8, § 6, prohibiting any indebtedness by a city in excess of a certain limit, has no application to such obligations as are made mandatory by the constitution and laws and necessary to maintain its corporate existence; but does not embrace expenses for a city dock, the improvement and repair of city streets not dangerous or requiring immediate attention, auditing books, sewer estimates, street lights, a typewriter, killing dogs, printing, court fees, and salaries which the city chooses

MUNICIPAL CORPORATIONS—CONTINUED.

- to make but not reduced to a bare necessity, all of which relate more to the welfare of the city than to its corporate existence. *Patterson v. Edmonds*..... 88
25. **SAME.** Indebtedness in excess of the constitutional limit may be created for the expense of holding a city election and for salaries of necessary city officers and supplies necessary to carry on the government. *Patterson v. Edmonds*..... 88
26. **SAME—ACTIONS TO RESTRAIN CITY—JUDGMENT.** In an action to restrain the issuance of bonds to refund warrants issued in excess of the constitutional limit, the judgment should be confined to that issue, and should not undertake to confirm the proceedings of the city council. *Patterson v. Edmonds*..... 88

MUTUALITY:

Failure to provide mutuality of remedies in contract, see **SPECIFIC PERFORMANCE, 1.**

Of obligation, see **SPECIFIC PERFORMANCE, 2-4.**

NAVIGABLE WATERS:

1. **NAVIGABLE WATERS—NAVIGABLE OR FLOATABLE STREAMS—EVIDENCE—SUFFICIENCY.** A stream that is navigable or floatable for shingle bolts only by artificial means, is not a public highway; and a stream is not navigable where it appears that drives required the assistance of men and teams in breaking up jams, opening new channels and keeping bolts from lodging, that no drives had been made without the use of the banks, and that few if any bolts could be brought down by natural means. *Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*..... 631
2. **SAME—EVIDENCE—MEANDER.** The fact that a stream is not meandered by the public survey does not establish its character as a navigable or nonnavigable stream. *Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*..... 631
3. **NAVIGABLE WATERS—FLOATABILITY—EVIDENCE.** The navigability of streams for floating shingle bolts is not determined by the size of the stream, but by their capacity for valuable public use in their natural condition. *Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.* 631
4. **SAME—RIPARIAN RIGHTS—USE OF WATERS—INJUNCTION.** The right to use a stream for floating logs is correlative with the right of a power company to use the water for power purposes, and as each right must be used with due regard to the other, an injunction against all use of the water cannot be sustained. *Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*..... 631
5. **NAVIGABLE WATERS—SHORE LANDS—ISLANDS.** No statutes of this state indicate any intention to pass to the owner of abutting lands

NAVIGABLE WATERS—CONTINUED.

the title to islands, even if joined to the mainland by a strip of "shore land," defined by Rem. & Bal. Code, §6641, as lands bordering on the shores of navigable lakes and rivers, below the line of ordinary high water. *Hauge v. Walton*..... 554

NAVIGATION:

See **NAVIGABLE WATERS**.

NECESSITOUS CIRCUMSTANCES:

Of wife through nonsupport of husband, see **HUSBAND AND WIFE**, 3, 5, 6.

NECESSITY:

Public necessity for condemnation of property, see **EMINENT DOMAIN**, 1.

For separate action to assess damages, upon defense of right to condemn in injunction suit, see **EMINENT DOMAIN**, 3.

Duplicate statements to owner of material furnished contractor, see **MECHANICS' LIENS**, 2.

Pleading relationship between owner and person ordering materials, see **MECHANICS' LIENS**, 5.

NEGLIGENCE:

Duty to repair bridge, see **BRIDGES**.

Carriage of passengers, see **CARRIERS**.

Of passenger, see **CARRIERS**, 7.

Measure of damages, see **DAMAGES**, 2-9.

Causing death, see **DEATH**.

In causing injuries from electricity, see **ELECTRICITY**.

Of employers, see **MASTER AND SERVANT**.

As joint tortfeasor, see **MASTER AND SERVANT**, 14, 15.

Contributory negligence of servant as question for jury, see **MASTER AND SERVANT**, 19, 21-24.

Of contractor in grading street, see **MUNICIPAL CORPORATIONS**, 12.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 19.

Of driver of automobile, see **MUNICIPAL CORPORATIONS**, 17-19.

Causing injury to property from obstruction of sewer, see **MUNICIPAL CORPORATIONS**, 20-22.

Causing damage from flow of water from city main, see **MUNICIPAL CORPORATIONS**, 23.

In treating patient, see **PHYSICIANS AND SURGEONS**.

In operation of street car, see **STREET RAILROADS**, 3-5.

Of person injured by operation of street railroad, see **STREET RAILROADS**, 4, 5.

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.

NEW TRIAL:

1. **NEW TRIAL—GROUNDS—MISCONDUCT OF COUNSEL.** In a case against a city, a new trial will not be granted for misconduct of plaintiff's counsel, in that at one time he represented the defendant, where it appears that when he was corporation counsel, his name had been signed to an answer for the defendant, but that he had nothing to do with the case, and was unexpectedly called to represent the plaintiff in the absence of his partner, and the case had been well tried and twice appealed. *Wolpers v. Spokane*..... 562
2. **NEW TRIAL—GROUNDS—SURPRISE.** Failure to call a certain witness does not entitle the adversary to a new trial on the ground of surprise. *Scandinavian American State Bank v. Downs*..... 79

NONSUPPORT:

See **HUSBAND AND WIFE**, 1-7.

Punishment of minor husband for, see **INFANTS**.

Of minor child, see **PARENT AND CHILD**.

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

To owner of diseased condition of animal placed on premises of another, see **ANIMALS**.

Of appeal, see **APPEAL AND ERROR**, 8.

Evidence of service of notice required by factory act, see **EVIDENCE**, 2.

Of intention to re-certify testimony given on former trial, see **EVIDENCE**, 6.

To creditors to present claims, see **EXECUTORS AND ADMINISTRATORS**, 3-6.

Issuance of final injunction without notice, see **INJUNCTION**.

To owner of materials furnished contractor, see **MECHANICS' LIENS**, 2-5.

Of intention to rescind optional sale of mining property, see **MINES AND MINERALS**, 3.

School election, see **SCHOOLS AND SCHOOL DISTRICTS**, 3.

Of increased valuations, see **TAXATION**, 3.

OBJECTIONS:

To information, mode and time for taking, see **INDICTMENT AND INFORMATION**, 1, 3.

To assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 8.

To pleadings, see **PLEADING**, 1.

To evidence, see **TRIAL**, 1.

To pleadings by demurrer, see **TRIAL**, 2.

To instructions, see **TRIAL**, 6.

OBSTRUCTIONS:

Causing damage from city sewer, see **MUNICIPAL CORPORATIONS**, 20-22.

OFFICERS:

County officers, see **COUNTIES**, 4, 5.

Municipal officers, see **MUNICIPAL CORPORATIONS**, 2-5.

OPENING:

Right to reopen case, see **TRIAL**, 5.

OPINION EVIDENCE:

In civil actions, see **EVIDENCE**, 4.

OPTION:

To rescind purchase of mining property, see **MINES AND MINERALS**, 3-5.

To purchase lands, see **VENDOR AND PURCHASER**, 1, 3.

ORAL CONTRACTS:

See **FRAUDS, STATUTE OF**.

ORDERS:

Review of, see **APPEAL AND ERROR**, 1, 2.

For publication of notice to creditors, see **EXECUTORS AND ADMINISTRATORS**, 4.

Power of court to order meeting of parties for conference, in action for annulment of marriage, see **MARRIAGE**.

ORDINANCES:

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 7-9, 17.

Franchise ordinance, conflict with city charter, see **STREET RAILROADS**, 1, 2.

ORIGINAL UNDERTAKING:

See **FRAUDS, STATUTE OF**, 1.

PARENT AND CHILD:

Recovery of damages for death of child, see **DEATH**.

1. **PARENT AND CHILD—NONSUPPORT—CRIMINAL PROSECUTION.** A conviction for neglecting to support a minor child is conclusive that the defendant had not complied with a decree of divorce requiring him to pay to his former wife monthly installments for the support of the child. *State v. Coolidge*..... 42
2. **SAME—CRIMINAL AND CIVIL LIABILITY—CONFLICT—PROSECUTION AFTER DIVORCE.** A conviction for neglecting to support a minor child cannot be had under the criminal statute, Rem. & Bal. Code, § 2444, in aid of a decree of divorce, where the custody of the child

PARENT AND CHILD—CONTINUED.

had been awarded to the mother, and the defendant was subject to the orders of the court in the civil proceeding requiring him to make monthly payments for such support, and the sentence and judgment in effect modified the decree of divorce without reference to it. *State v. Coolidge*..... 42

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

To explain writing, see CONTRACTS, 3.
To prove payment of corporate license fee, see CORPORATIONS, 11.
In civil actions, see EVIDENCE, 3.
To prove trust, see TRUSTS.

PAROL PARTITION:

Between tenants in common, see TENANCY IN COMMON.

PARTIES:

Death ground for abatement, see ABATEMENT AND REVIVAL, 2.
Right to appeal, see APPEAL AND ERROR, 3, 4.
Entitled to notice of appeal, see APPEAL AND ERROR, 8.
Rights and liabilities as to costs, see COSTS.
Issuance on *ex parte* application of order for parties litigant to meet, see INJUNCTION.
Persons concluded by judgment, see JUDGMENT, 6.
Order for parties to meet for conference, in action for annulment of marriage, as infringement of civil rights, see MARRIAGE.
Cotenants, see TENANCY IN COMMON.

PARTITION:

Between tenants in common, see TENANCY IN COMMON.

PARTNERSHIP:

1. PARTNERSHIP—EXISTENCE OF RELATION—EVIDENCE — SUFFICIENCY.
A finding that one of two brothers, employed by the other, was not a partner in the business nor liable as a partner by reason of having held himself out as a partner, is sustained, where although his brother did business under the name of S. Brothers (having bought out a former partnership business of a deceased brother, conducted in that name), and used letter-heads and received mail addressed in such firm name, and although many persons considered him a partner from such circumstances and the conduct of his brother, he himself had never assumed to act as a partner nor done or said anything to create the impression or mislead any person. *Downtie v. Savage* 164
2. PARTNERSHIP — COMPENSATION OF PARTNERS. A partner cannot claim compensation from the partnership in the absence of an agree-

PARTNERSHIP—CONTINUED.

ment therefor, even if he renders exceptional services; especially where an agreement had been made whereby each was to draw a like amount each month. *Boothe v. Summit Coal Mining Co.*..... 679

PASSENGERS:

Carriage of, see **CARRIERS**.

PATENTS:

For public lands, see **PUBLIC LANDS**.

PAYMENT:

See **ACCORD AND SATISFACTION; COMPROMISE AND SETTLEMENT**.

Act prohibiting manufacturer from paying retail liquor license, see **CONSTITUTIONAL LAW**.

Of corporate license fee, see **CORPORATIONS**, 11-13.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 2, 5.

Promise to pay debt of another, see **FRAUDS, STATUTE OF**, 1.

Of taxes to sustain title by adverse possession, see **LIFE ESTATES**.

To dependents under industrial insurance act, see **MASTER AND SERVANT**, 1, 2.

Taxes, see **TAXATION**, 4.

Liability of assignee for payments under option agreement, see **VENDOR AND PURCHASER**, 3.

1. **PAYMENT—PRESUMPTIONS—LAPSE OF TIME.** While the presumption of payment arising from lapse of time, in connection with other circumstances, applies to taxes, it is not a bar, but is rebuttable and affects only the burden of proof. *Graves v. Stone*. 382

PENALTIES:

Recovery by landlord in action on bond, see **INDEMNITY**.

Construction of penal statutes in general, see **STATUTES**, 2.

PERFORMANCE:

Of contract entitling broker to commission, see **BROKERS**.

Compelling performance of contract, see **SPECIFIC PERFORMANCE**.

PERSONAL INJURIES:

Caused by defective bridge, see **BRIDGES**.

To passenger, see **CARRIERS**.

To servant employed in interstate commerce, see **COMMERCE**.

Damages for, see **DAMAGES**, 2-9.

From electric current, see **ELECTRICITY**.

Admissibility of evidence of mental shock in action for, see **EVIDENCE**, 1.

Damages for loss of wife's services in action for injuries, see **HUSBAND AND WIFE**, 8.

PERSONAL INJURIES—CONTINUED.

To employee, see **MASTER AND SERVANT**.

To pedestrian during grading of street, see **MUNICIPAL CORPORATIONS**, 12.

To person on city street, see **MUNICIPAL CORPORATIONS**, 17-19.

To person on or near street railroad track, see **STREET RAILROADS**, 3-5.

PETITION:

To vacate highway as estopping signer to assert title, see **ESTOPPEL**, 1.

For public improvement, see **MUNICIPAL CORPORATIONS**, 6

PHOTOGRAPHS:

As evidence, see **CARRIERS**, 9.

PHYSICIANS AND SURGEONS:

As experts, see **EVIDENCE**, 4.

1. **PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.** In an action for malpractice the negligence of the defendant is for the jury, where it appears that the defendant treated plaintiff for severe injuries sustained by a fall which included injury to his shoulder, that the shoulder was not then dislocated, but the arm not improving, was subjected to manipulation by the defendant, which dislocated the shoulder, discovered by other physicians, and which required an operation and resulted in a shortening of the arm. *Taylor v. Kidd*..... 18
2. **PHYSICIANS AND SURGEONS—MALPRACTICE—EXCESSIVE VERDICT.** A verdict for malpractice is excessive, where it indicates that the jury considered plaintiff's entire loss, through a fall for which he was treated, instead of merely the consequences of the doctor's negligence. *Taylor v. Kidd*..... 18

PLAYGROUND:

Power of school district to purchase property for, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

PLEADING:

See **SET-OFF AND COUNTERCLAIM**.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

In action to vacate judgment, see **JUDGMENT**, 1.

In action for injuries to servant, see **MASTER AND SERVANT**, 25.

Enforcement of mechanics' lien, see **MECHANICS' LIENS**, 5.

Foreclosure, see **MORTGAGES**, 3.

In action for purchase price, see **SALES**, 1.

PLEADING—CONTINUED.

1. PLEADING—AMENDMENT TO CONFORM TO PROOF—OBJECTIONS. A complaint cannot be deemed amended to conform to proof of an issue in no manner tendered, the evidence being admitted over the constant objection of the defendant. *Oldfield v. Angeles Brewing & Malting Co.* 168
2. PLEADING—COMPLAINT—AMENDMENT—DEPARTURE. In an action for rent due, under a lease which the defendant refused to accept after agreeing to do so, the complaint may be amended to show a cause of action for damages for refusing to take the lease. *Oldfield v. Angeles Brewing & Malting Co.*..... 168
3. PLEADING—SUPPLEMENTAL COMPLAINT—OFFICE. In an action to quiet the title of a divorced wife in community property not disposed of by the decree, which was prematurely commenced before the final decree of divorce was entered, it is not allowable by supplemental complaint to plead the subsequent entry of the decree of divorce; since a premature action cannot be sustained by a supplemental complaint showing a later cause of action under a new class of facts which is the antithesis of the first cause pleaded. *Keeler v. Parks* 255
4. PLEADING—SUPPLEMENTAL COMPLAINT—DEPARTURE. An action commenced by one as a divorced woman, to recover a joint interest in community property not disposed of by a decree of divorce, cannot be sustained by the substitution, in a supplemental complaint, of a cause of action by the wife for the protection of her rights in the community property of herself and husband, a final decree of divorce not having been entered; since it would be the substitute of a different cause of action. *Keeler v. Parks*..... 255
5. PLEADING—ISSUES AND PROOF—FATAL VARIANCE. Where a judgment for rent due was reversed for the reason that the defendant, who never accepted a lease, was liable only for breach of an agreement to lease, and that the proper measure of damages was the difference between the stipulated rent and the actual rental value for the term, it is error to proceed on a second trial, over defendant's objection, without amending the complaint, which only alleged a specific rental due, and tendered no issue as to the rental value of the premises and made no demand for damages in any sum. *Oldfield v. Angeles Brewing & Malting Co.*..... 168

POLICY:

Of insurance, see INSURANCE.

POSSESSION:

Of forged check, presumptions, see FORGERY, 3.

By tenant as waiver of right to full performance of building contract, see LANDLORD AND TENANT, 4.

POWERS:

- To grant franchise, see MUNICIPAL CORPORATIONS, 1.
- Of council to discontinue office, see MUNICIPAL CORPORATIONS, 2.
- Of school district to purchase property for playground, see SCHOOLS AND SCHOOL DISTRICTS, 2.

PRACTICE:

- See APPEAL AND ERROR; CRIMINAL LAW; DAMAGES; EVIDENCE; JUDGMENT; NEW TRIAL; PLEADING; RECEIVERS; TRIAL.
- Prosecution of actions in general, see ACTION.
- In equity, see EQUITY.

PREJUDICE:

- Ground for reversal in civil actions, see APPEAL AND ERROR, 20-22.

PRESCRIPTION:

- Establishment of highways, see HIGHWAYS, 1, 2.
- Rights acquired by, see WATERS AND WATER COURSES, 5.

PRESENTMENT:

- Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2, 3, 5-7.

PRESUMPTIONS:

- On appeal, see APPEAL AND ERROR, 15, 17-19.
- Of negligence in carriage of passengers, see CARRIERS, 3.
- As to natural and probable consequences of act, see CRIMINAL LAW, 8.
- As to superior title, see EJECTMENT.
- From possession of forged check, see FORGERY, 3.
- As to payment, see PAYMENT.
- As to foreign laws, see STATUTES, 3.

PRINCIPAL AND AGENT:

- See BROKERS.
- Insurance agents, see INSURANCE, 1.
- Agency of employee as question for jury, see MASTER AND SERVANT, 3.

PRIORITIES:

- Of chattel mortgage over unrecorded conditional bill of sale, see SALES, 2.
- Of water rights, see WATERS AND WATER COURSES, 1.

PROBATE:

- Conclusiveness of erroneous decree admeasuring dower, see JUDGMENT, 3.

PROCESS:

- On appeal, see APPEAL AND ERROR, 8.

PROFITS:

Recovery of prospective profits, see DAMAGES, 1.

Secret profit by cotenant in trade of interests, see TENANCY IN COMMON, 2.

PROMISE:

To pay debt of another, see FRAUDS, STATUTE OF, 1.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROOF:

Of payment of corporate license fee, see CORPORATIONS, 11-13.

Of loss insured against, see INSURANCE, 2.

Necessity of proving relationship between owner and persons ordering or contracting for materials, see MECHANICS' LIENS, 5.

PROPERTY:

Title to by assignment of contract, see ASSIGNMENTS, 2, 3.

Taking or damaging for public use, see EMINENT DOMAIN.

Damage to by public improvement, see MUNICIPAL CORPORATIONS, 13, 14.

Power of school district to purchase for playground, see SCHOOLS AND SCHOOL DISTRICTS, 2.

Subject of conversion, see TROVER AND CONVERSION.

Conveyed in trust, see TRUSTS.

PROXIMATE CAUSE:

Of accident to passenger in elevator, see CARRIERS, 8.

Of injury from electric shock, see ELECTRICITY, 2.

Of injury to servant, see MASTER AND SERVANT, 24.

PUBLICATION:

Of notice to creditors, see EXECUTORS AND ADMINISTRATORS, 3, 4.

PUBLIC DEBT:

Limitations, see MUNICIPAL CORPORATIONS, 24-26.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 6-11, 13-16.

PUBLIC LANDS:

1. PUBLIC LANDS—"FRAGMENTARY" TRACTS OR ADJOINING ISLANDS—FEDERAL GRANT—TITLE OF STATE—RIPARIAN RIGHTS. Under the constitution whereby the state has been granted by the Federal government title to all shore lands, and the beds of navigable lakes and streams, riparian owners under Federal patent take title only to the line of ordinary high water, and acquire no interest in islands severed from the mainland by shore lands; hence such an owner

PUBLIC LANDS—CONTINUED.

who has purchased from the state the "abutting shore lands," acquires no interest in an island, separated from the mainland by the intervening shore lands, although during low water in the dry season the island was connected with the mainland by a strip of uncovered shore lands. *Hauge v. Walton*..... 554

PUBLIC POLICY:

See **CONTRACTS**, 1.

Contract for payment of retail liquor license in violation of law, see **INTOXICATING LIQUORS**, 4.

PUBLIC USE:

Taking property for public use, see **EMINENT DOMAIN**.

Opening street for public travel, what constitutes, see **HIGHWAYS**, 8.

PUNISHMENT:

Conviction of minor husband for nonsupport, see **INFANTS**, 2; **HUSBAND AND WIFE**, 7.

QUALIFICATIONS:

Voluntary disqualification of defendant to perform contract, see **SPECIFIC PERFORMANCE**, 5.

QUESTION FOR JURY:

Inflicting "grievous bodily harm" on person assaulted, see **ASSAULT**, 8.

Agency of employee, see **MASTER AND SERVANT**, 3.

In actions for injuries to servants, see **MASTER AND SERVANT**, 7, 9-11, 19-23.

Negligence causing injury from collision with automobile, see **MUNICIPAL CORPORATIONS**, 18, 19.

Negligence in treatment of patient, see **PHYSICIANS AND SURGEONS**, 1.

RAILROADS:

Carriage of goods and passengers, see **CARRIERS**, 2, 3, 9.

Injury to servant employed in interstate commerce, see **COMMERCE**.

Release of claim for injuries, see **COMPROMISE AND SETTLEMENT**.

Appropriation of property, see **EMINENT DOMAIN**, 1.

As employers, see **MASTER AND SERVANT**, 6.

In city streets, see **STREET RAILROADS**.

RATIFICATION:

Of act of attorney, see **ATTORNEY AND CLIENT**, 1.

REAL ESTATE AGENTS:

See **BROKERS**.

REBUTTAL:

Evidence in prosecution for violation of fishing law, see **FISH**, 3.

RECALL:

Of remittitur, see **APPEAL AND ERROR**, 25, 26.

RECEIVERS:

Right to account assigned prior to appointment, see **ASSIGNMENTS**, 3.

1. **RECEIVERS—REMEDIES AGAINST—PROCEDURE.** Where a receiver wrongfully obtained possession of a warrant that had been assigned by the receiver's insolvent, the regular procedure is for the assignee to obtain an order in the receivership case requiring the receiver to return it or its proceeds. *McGill v. Brown*..... 514
2. **RECEIVERS—ACTIONS—LEAVE TO SUE.** Where a receiver was appointed after an action was commenced, it is not necessary to obtain leave to sue the receiver. *Oldfield v. Angeles Brewing & Malt-ing Co.* 168
3. **RECEIVERS—TEMPORARY RECEIVERS—ACTIONS—CAPACITY TO SUE.** A temporary or *ad interim* receiver in bankruptcy, not being vested with the title to the estate of the alleged bankrupt, cannot maintain an action on behalf of the estate, in the absence of a showing that the property sought is in danger of being dissipated; and hence has no capacity to sue on mere choses in action or for unliquidated damages. *Fletcher v. Murray Commercial Co.*..... 525

RECORDS:

On appeal, see **APPEAL AND ERROR**, 10-16.

Transcript and statement of facts on appeal, see **CRIMINAL LAW**, 10.

Estoppel by record, see **ESTOPPEL**, 1.

As evidence, see **EVIDENCE**, 6.

Recording conditional bill of sale, see **SALES**, 2, 3.

REDUCTION:

Unlawful reduction of capital stock, see **CORPORATIONS**, 4-6.

REFORMATION OF INSTRUMENTS:

On ground of mutual mistake, see **EQUITY**.

1. **REFORMATION OF INSTRUMENTS—DESCRIPTION—MISTAKE—INTENT—EVIDENCE—SUFFICIENCY.** Findings that a contract to convey "all ground covered by 3 buildings" at a certain street number, subject to a mortgage, should be reformed to include a six-foot way to the west of the buildings on which there was a walk, are sustained, where it appears that the mortgage assumed by the grantee covered that portion of the lot, the balance of the lot retained by the grantor being subject to other liens and held as a separate property, that the grantor made statements at the time that the contract included all the portion of the lot covered by the mortgage, and that the walk to the west had the appearance of being constructed for the use of the buildings and was attached thereto, and the fact that such tract was in a sense one piece of property. *Lisle v. Quinlan*.... 493

REFORMATION OF INSTRUMENTS—CONTINUED.

2. **REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EQUITY—JURISDICTION.** Equity has jurisdiction to reform a written lease for mutual mistake, hence parol evidence of mistake is not inadmissible as varying the terms of a written contract. *Silbon v. Pacific Brewing & Malting Co.*..... 13
3. **SAME—EVIDENCE OF MISTAKE—SUFFICIENCY.** The uncontradicted evidence of defendant's agent of a completed agreement, which by mistake was not incorporated in the terms of a written lease, as prepared by the plaintiff, is sufficient to authorize a reformation prayed for by defendant, under the rule that the evidence must be clear and convincing, even if the agent was negligent in failing to discover the mistake before executing the lease. *Silbon v. Pacific Brewing & Malting Co.*..... 13
4. **REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY.** Equity will reform a deed where the evidence of a mutual mistake is clear and convincing, and the evidence is sufficient that a warranty deed, excepting a mortgage which the "first" party assumed to pay, was so written by mutual mistake, where every witness present when the deal was consummated contradicted the evidence of the grantee that he did not assume it, and corroborated the preliminary written agreement of the parties. *Young v. Jones*..... 277

REGULATION:

Of fishing appliances and time for taking fish, see **FISH**.

REHEARING:

Modification of judgment on for waiver of appellant's rights pending appeal, see **APPEAL AND ERROR**, 5.

RELATION:

Alleging or proving relationship between owner and persons ordering or contracting for materials, see **MECHANICS' LIENS**, 5.

Existence of, see **PARTNERSHIP**, 1.

RELEASE:

See **ACCORD AND SATISFACTION**; **COMPROMISE AND SETTLEMENT**.

RELEVANCY:

Of evidence in prosecution for violation of fishing law, see **FISH**, 4.

REMAINDERMEN:

See **LIFE ESTATES**.

Action to establish title, see **REMAINDERS**.

REMAINDERS:

1. **REMAINDERS—RIGHT OF ACTION—LIMITATION AND LACHES.** Remaindermen are not guilty of laches in failing to assert title during

REMAINDERS—CONTINUED.

the lifetime of the life tenant, even if the life tenant conveyed his interests by deed purporting to convey the fee. *McDowell v. Beckham* 224

2. **REMAINDERS—WASTE—RIGHT OF ACTION.** The statutory right of action for waste by remaindermen may be waived without creating or defeating a title to the estate. *McDowell v. Beckham*..... 224

REMITTITUR:

Recall of, see **APPEAL AND ERROR**, 25, 26.

REMOVAL:

Of city officer, see **MUNICIPAL CORPORATIONS**, 2-5.

RENT:

See **LANDLORD AND TENANT**, 3.

REPAIRS:

Duty to keep city bridge in repair, see **BRIDGES**.

By tenant, see **LANDLORD AND TENANT**, 4.

REPEAL:

Implied repeal of act granting power in mayor and council to grant franchises, see **MUNICIPAL CORPORATIONS**, 1.

REPUTATION:

Competency of witness to testify as to, see **WITNESSES**, 1.

REQUESTS:

For instructions, see **CRIMINAL LAW**, 9; **TRIAL**, 8-10.

RESCISSION:

Of release on ground of fraud, see **COMPROMISE AND SETTLEMENT**.

Of sale of corporate stock for fraud, see **CORPORATIONS**, 7.

By purchaser of optional sale of mining property, see **MINES AND MINERALS**, 3-5.

Of contract of sale, see **SALES**, 1.

Right of purchaser to rescind contract as affecting right to performance, see **SPECIFIC PERFORMANCE**, 2.

RES GESTAE:

In civil actions, see **EVIDENCE**, 1.

RESIDENCE:

Of corporation, see **CORPORATIONS**, 1-3.

RES IPSA LOQUITUR:

See **CARRIERS**, 3; **MASTER AND SERVANT**, 12.

RES JUDICATA:

See JUDGMENT, 2-5.

Personal judgment on note as bar to foreclosure of mortgage lien,
see MORTGAGES, 4.

RESTRAINT OF TRADE:

Contracts in restraint of trade, see CONTRACTS, 2.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 10-12.

REVIVAL:

Of action, see ABATEMENT AND REVIVAL.

RIPARIAN OWNERS:

Title to island on purchasing abutting shore lands from state, see
PUBLIC LANDS.

RIPARIAN RIGHTS:

See WATERS AND WATER COURSES, 1-3.

To use of waters of stream, see NAVIGABLE WATERS, 4.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 8, 16-20.

ROADS:

See HIGHWAYS.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 4-11, 17.

SAFETY LAMPS:

Use of in coal mines, see MINES AND MINERALS, 1, 2.

SALARY:

Of county officers, see COUNTIES, 4, 5.

Of wrongfully removed officer, see MUNICIPAL CORPORATIONS, 4.

Compensation of partners, see PARTNERSHIP, 2.

SALES:

Conditional sales by corporation, see CORPORATIONS, 1-3.

Of corporate stock, see CORPORATIONS, 4-7.

On execution, see EXECUTION.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

Of mining property, see MINES AND MINERALS, 3-5.

SALES—CONTINUED.

Specific performance of contract, see **SPECIFIC PERFORMANCE.**

Of realty, see **VENDOR AND PURCHASER.**

1. **SALES—ACTION FOR PRICE—DEFENSES—FAILURE OF TITLE—RESCISION—FRAUD—DILIGENCE.** Upon the sale of a lodging house, subject to three debts described as chattel mortgages, the fact that one debt was evidenced by a conditional bill of sale does not authorize the purchaser to plead "failure of title or breach of warranty of title" in an action for the purchase price, commenced long after the sale, where there was no offer to rescind, the defendant was not disturbed in her possession or prejudiced, and there was no fraud or bad faith, but a mere inadvertence in describing the debt. *Higson v. Hughes* 362
2. **SALES—CONDITIONAL SALES—RECORDING — INCUMBRANCES — ANTECEDENT DEBT—CHATTEL MORTGAGES—PRIORITY.** A mortgagee in a chattel mortgage given to secure an antecedent debt, without notice of the conditional nature of the mortgagor's title, is an incumbrancer in good faith, who has priority over a prior unrecorded conditional bill of sale, within the meaning of Rem. & Bal. Code, § 3670, providing that conditional sales of property placed in the possession of the vendee shall be absolute as to subsequent purchasers, incumbrancers and subsequent creditors in good faith, unless the bill of sale be recorded within ten days. *Worley v. Metropolitan Motor Car Co.* 243
3. **SAME—RECORDING—WHEN TITLE PASSES—EXECUTION AFTER DELIVERY—VALIDITY.** Under Rem. & Bal. Code, § 3670, providing that conditional sales of property placed in the possession of the vendee shall be absolute as to purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession, the bill of sale be recorded, the rights of the vendor can be reserved by a conditional bill of sale only when the contract is signed within ten days after possession was given over; and after delivery of possession, a conditional sales contract cannot be antedated and made to answer the purpose of a chattel mortgage. *Worley v. Metropolitan Motor Car Co.* 243

SCHOOLS AND SCHOOL DISTRICTS:

1. **SCHOOLS AND SCHOOL DISTRICTS — JOINT DISTRICTS — ESTABLISHMENT—PROCEEDINGS—APPEAL—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 4457, providing that the decision of two county school superintendents creating a joint school district from the territory of two counties shall be final, there is no appeal therefrom to the board of county commissioners of one of the counties, as provided for by other sections of the school code in the case of specified decisions of a county school superintendent covering territory lying wholly within the same county. *State ex rel. School District etc. v. Board of County Com'rs.* 454

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

2. SCHOOLS AND SCHOOL DISTRICTS — POWERS — PURCHASE OF PLAYGROUND. A school district has power to purchase property for the purpose of a gymnasium and playground for the use of school children. *Sorenson v. Perkins & Co.*..... 16
3. SCHOOLS AND SCHOOL DISTRICTS—ELECTIONS—NOTICE — SUFFICIENCY. A notice of a special school district election does not invalidate the election merely because it was not as full and complete as it might have been. *Sorenson v. Perkins & Co.*..... 16
4. SCHOOLS AND SCHOOL DISTRICTS—ORDERS OF SCHOOL BOARD—DISCHARGE OF TEACHER—APPEAL—DISQUALIFICATION OF SCHOOL SUPERINTENDENT—REVIEW BY COURTS. The superior court has jurisdiction of an action to review a decision of a board of school directors discharging a teacher, where the county superintendent of schools had disqualified himself from reviewing the decision on the appeal provided by law, by appearing at and dominating the school board meeting, demanding the teacher's resignation, and threatening her with cancellation of her certificate authorizing her to teach unless she resigned, and denying her any opportunity to be heard. *State ex rel. Caffrey v. Superior Court.*..... 444

SEDUCTION:

Accrual of action for while minor, see LIMITATION OF ACTIONS.

SENTENCE:

Judgment against minor husband for nonsupport, see HUSBAND AND WIFE, 7.

SERVICE:

Loss of wife's services as element of damage, see HUSBAND AND WIFE, 8.

Personal services, see WORK AND LABOR.

SET-OFF AND COUNTERCLAIM:

1. SET-OFF AND COUNTERCLAIM—AGAINST ASSIGNED CLAIMS—PERSONS ENTITLED—STATUTES—CONSTRUCTION. A claim against an assignor cannot be asserted by way of counterclaim against the assignee of an executory contract to sell goods for future delivery, on which nothing was due and which the assignee took while in the executory stage; in view of Rem. & Bal. Code, § 191, providing that any debtor may plead a counterclaim against an assigned debt, if held by him against the original owner, and Id., § 266, authorizing a set-off of any demand against the plaintiff which existed and belonged to defendant at the time of the suit, and against any assigned demand if it existed at the time of the assignment; since these statutes are *in pari materia*, and construed together do not authorize a set-off against the assignee of an executory contract, when both claims

SET-OFF AND COUNTERCLAIM—CONTINUED.

are not matured, and which could not have been asserted against the assignor prior to the assignment. *King v. West Coast Grocery Co.* 132

SETTLEMENT:

See ACCORD AND SATISFACTION; COMPROMISE AND SETTLEMENT; PAYMENT.

SEWERS:

Damages to property from obstruction of, see MUNICIPAL CORPORATIONS, 20-22.

SHORE LANDS:

See NAVIGABLE WATERS, 5.

SIGNATURES:

Signature of one party to contract as affecting mutuality, see SPECIFIC PERFORMANCE, 4.

SPECIFIC PERFORMANCE:

1. SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY. Equity will not refuse specific performance of a contract for the sale of land because of the fact that a mutuality of remedies was not provided in the contract, where the contract was fully executed on the part of the plaintiff at the time of filing the bill. *Wright v. Suydam*..... 587
2. SPECIFIC PERFORMANCE—MUTUAL OBLIGATIONS—RIGHT TO RESCIND. A contract for the sale of land is not so lacking in mutuality that the law will not enforce specific performance, from the fact that it provides that the purchaser may rescind in case the title is not satisfactory to him, since he would be compelled to accept a marketable title. *Wright v. Suydam*..... 587
3. SAME—MUTUALITY OF OBLIGATION. A contract for the sale of land is not so lacking in mutuality that it cannot be specifically enforced from the fact that the purchaser may satisfy all obligations on his part by forfeiting the sum of \$100 paid as part of the purchase price, that being a sufficient consideration for the owners' obligation to convey. *Wright v. Suydam*..... 587
4. SAME—MUTUALITY—SIGNATURE BY ONE PARTY. A contract signed by only one of the parties is not for that reason lacking in mutuality. *Wright v. Suydam*..... 587
5. SPECIFIC PERFORMANCE—DEFENSES—TITLE OF VENDOR—VOLUNTARY DISQUALIFICATION TO PERFORM. It is not a defense to specific performance of a contract to convey land that the defendant voluntarily disqualified himself from vesting title by conveying the land to a third person, where the plaintiff is proceeding upon the theory that he is not disqualified and is willing to take a conveyance from the defendant in accordance with the terms of the contract. *Wright v. Suydam* 587

SPEED:

Construction of ordinance fixing speed limit for automobiles, see **MUNICIPAL CORPORATIONS**, 17.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 12-14; **CRIMINAL LAW**, 10.

Duplicate statement to owner of material furnished contractors, see **MECHANICS' LIENS**, 2-4.

STATES:

Public lands, see **PUBLIC LANDS**.

Presumptions as to laws of foreign country, see **STATUTES**, 3.

Taxation of leasehold interest in state lands, see **TAXATION**, 1.

STATUTES:

See **SET-OFF AND COUNTERCLAIM**.

Right to contest will, survival of action, see **ABATEMENT AND REVIVAL**, 2.

Provisions determining negotiability of note, see **BILLS AND NOTES**.

Federal employers' liability act, construction, see **COMMERCE**.

Violating constitutional guaranties, see **CONSTITUTIONAL LAW**.

Validity of contracts made in violation of statute, see **CONTRACTS**, 1.

Right of accused to speedy trial, see **CRIMINAL LAW**, 1.

Actions for wrongful death, see **DEATH**.

Regulation of fishing appliances and times for taking fish, see **FISH**.

Statute of frauds, see **FRAUDS, STATUTE OF**.

Charging offense in language of statute, see **INDICTMENT AND INFORMATION**, 1.

Of limitation, see **LIMITATION OF ACTIONS**.

Providing for payments to dependents of deceased workman, see **MASTER AND SERVANT**, 1, 2.

Use of safety lamps in coal mines, see **MINES AND MINERALS**, 1.

Conferring power to grant franchises, see **MUNICIPAL CORPORATIONS**, 1.

Creation of joint school districts, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.

1. **STATUTES—TITLES AND SUBJECTS—INTOXICATING LIQUORS.** The title to the act of 1909, Rem. & Bal. Code, § 6282, "to prohibit any manufacturer . . . from having any interest . . . in any retail liquor license . . . or to become surety on any liquor dealer's bond . . ." is broad enough to include the provision of the act prohibiting such manufacturer from paying or advancing money or becoming surety for the payment of a retail liquor license. *Lewer v. Cornelius* 124

STATUTES—CONTINUED.

2. **STATUTES—CONSTRUCTION.** Penal statutes which are only *malum prohibitum* are to be strictly construed with reference to the liberty of the citizen. *State v. Coolidge*..... 42
3. **STATUTES—FOREIGN LAWS—PRESUMPTIONS.** In the absence of allegation, it will be presumed that the bankruptcy laws of a foreign country are the same as our own. *Fletcher v. Murray Commercial Co.* 525

STIPULATIONS:

1. **STIPULATIONS—CONSTRUCTION—SUBMITTING MATTER TO COURT—ARBITRATION—APPEAL.** A stipulation between a defendant and his attorneys, in a divorce case, made with a view of substituting other counsel, providing that the amount of their compensation shall be fixed by the judge of the trial court, submits the matter to the judge as a court and not as an arbitrator, whose decision is therefore appealable. *Jones v. Jones*..... 517

STOCK:

Corporate stock, see CORPORATIONS, 4-7.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 8.

STREET RAILROADS:

Carriage of passengers, see CARRIERS, 1, 4, 5.

Grant of franchise by city, see MUNICIPAL CORPORATIONS, 1.

1. **STREET RAILROADS—FRANCHISES—ORDINANCES.** A street railway franchise ordinance to extend lines for two blocks, expressly declaring that nothing therein contained shall affect any franchise previously granted or authorize the city to acquire any property in the public streets heretofore constructed or located under any franchise previously granted, conflicts with a provision in a city charter providing that when any franchise is granted, the grantee shall voluntarily agree that "all the property of the grantee within the limits of the public streets" may be taken by the city at a fair valuation. *Dolan v. Puget Sound Traction, Light & Power Co.*... 343
2. **STREET RAILWAYS—ORDINANCE—FRANCHISE—VALIDITY—CONFLICT WITH STATE LAW.** The city charter of Seattle, art. 4, § 20, making an ordinance granting a street railway franchise subject to a referendum vote of the people, and requiring any extension, or new franchise covering any substantial part of an old one, to be first submitted to a vote of the qualified electors, is void; since the legislature by Rem. & Bal. Code, § 9080, has vested in the legislative authority of the city the power to grant street railway franchises without the restrictions imposed by the charter. *Dolan v. Puget Sound Traction, Light & Power Co.*..... 343

STREET RAILROADS—CONTINUED.

3. **STREET RAILWAYS—INJURY TO PERSONS IN STREETS—NEGLIGENCE.**
It is not negligence, as regards persons in the streets, for a street car company to allow persons to ride on the steps of a loaded car, so that their bodies protruded beyond the ordinary line of the sides of the car, where the car approached slowly and an alarm was sounded. *Graves v. Tacoma R. & Power Co.*..... 387
4. **SAME—CONTRIBUTORY NEGLIGENCE.** A person intending to board a street car is guilty of contributory negligence, where it appears that he saw the car, approaching slowly, in time to avoid being struck by the bodies of persons riding on the steps, but failed to do so. *Graves v. Tacoma R. & Power Co.*..... 387
5. **STREET RAILROADS—ACCIDENT AT CROSSING—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE OF DRIVER—EVIDENCE—SUFFICIENCY.** A chauffeur, whose car was hit by an electric car at a city crossing, as he started to cross the tracks behind another electric car discharging passengers on a parallel track, is guilty of contributory negligence, precluding any recovery, where his view on approaching the crossing was unobstructed for a distance of eight blocks, and he could have seen the approaching car if he had looked for it, but he failed to do so when he had the opportunity, and undertook to cross the track from behind the standing car where his view was obstructed without having observed the other car. *Bardshar v. Seattle Electric Co.*..... 200

STREETS:

See MUNICIPAL CORPORATIONS, 6, 12, 17-19.
Damaging property by grade of street, see EMINENT DOMAIN, 2.
Vacation by abandonment, see HIGHWAYS, 3.

SUBLETTING:

See LANDLORD AND TENANT, 1, 5, 6.

SUBMISSION:

Of matter to judge as court, see STIPULATIONS.

SUBSTITUTION:

Of attorneys, see ATTORNEY AND CLIENT, 2.

SUPERSEDEAS:

On appeal, see APPEAL AND ERROR, 9.

SUPPLEMENTARY PLEADING:

See PLEADING, 3, 4.

SURPRISE:

Ground for new trial, see NEW TRIAL, 2.

SURRENDER:

Of leased premises, see **LANDLORD AND TENANT**, 7.

SURVIVAL:

Of action, see **ABATEMENT AND REVIVAL**, 2.

TAXATION:

Payment of taxes to sustain title by adverse possession, see **LIFE ESTATES**, 4, 5.

Presumption as to payment of tax, see **PAYMENT**.

1. **TAXATION — ASSESSMENT — VALUATION OF LEASEHOLD — EXCESSIVE ASSESSMENT.** Where a leasehold interest in state lands is subject to a bonded indebtedness against improvements which revert to the state, so that it has no real market value, its valuation for the purposes of taxation must be measured by both its burdens and its benefits; and an assessment based on gross income or benefits alone is excessive. *Metropolitan Building Co. v. King County*..... 47
2. **SAME—EXCESSIVE ASSESSMENT—FRAUD.** An assessment of property for taxation will not be set aside as excessive unless the evidence is clear that the board of equalization acted arbitrarily or fraudulently. *Blumauer v. Mann*..... 429
3. **TAXATION—VALUATION—EQUALIZATION—NOTICE OF INCREASE.** Taxpayers who appeared before the board of equalization to protest against increased valuations, pursuant to a notice to show cause, cannot thereafter object that the notice was insufficient in form. *Blumauer v. Mann*..... 429
4. **TAXATION — PAYMENT — EVIDENCE—SUFFICIENCY.** A finding that personal property taxes had not been paid is sustained, notwithstanding the presumptions arising from the lapse of ten years and the fact that the taxpayer was morally certain that he had paid them ten years before by check, where it appears that he allowed his real property taxes to go delinquent the same year and redeemed them later, and the treasurer's books showed that they had not been paid. *Graves v. Stone*..... 382

TEACHERS:

Discharge of, review by courts, see **SCHOOLS AND SCHOOL DISTRICTS**, 4.

TENANCY IN COMMON:

1. **TENANCY IN COMMON — PARTITION BY PAROL — EQUITY — FRAUDS, STATUTE OF.** A parol partition between tenants in common, followed by possession and improvements in severalty, operates in equity as a severance of the cotenancy, which is not within the statute of frauds. *Briggle v. Cox*..... 574
2. **TENANCY IN COMMON—JOINT TRANSACTIONS—TRADE—FALSE REPRESENTATIONS—LIABILITY FOR SECRET BONUS.** Where tenants in common who had severed their cotenancy by parol and the making of

TENANCY IN COMMON—CONTINUED.

improvements in severalty, afterwards dealt jointly in making a trade of their interests and treated the cotenancy as existing, one of them, standing in a confidential if not fiduciary relation to the other in making the trade, cannot make a secret profit through false suggestion or misrepresentation leading the other to believe that they had contributed the consideration in equal parts; and if he does so, he is liable to the other in an action for money had and received. *Briggle v. Cox*..... 574

TENDER:

Of purchase price, see **VENDOR AND PURCHASER**, 2.

TIME:

For taking objection to sufficiency of information, see **INDICTMENT AND INFORMATION**, 2.

For rescission of optional sale of mining property, see **MINES AND MINERALS**, 3.

Lapse of as presumption of payment, see **PAYMENT**.

For taking exceptions at trial, see **TRIAL**, 6.

For tender of purchase price, see **VENDOR AND PURCHASER**, 2.

TITLE:

See **EJECTMENT**.

To property by assignment, see **ASSIGNMENTS**, 2, 3.

Estoppel to assert, see **ESTOPPEL**, 1.

By adverse possession and payment of taxes, see **LIFE ESTATES**.

Of state under Federal grant, see **PUBLIC LANDS**.

Of remainderman, see **REMAINDERS**.

Under conditional sales contract, see **SALES**, 2, 3.

Conveyance of title to third person as defense to performance of contract, see **SPECIFIC PERFORMANCE**, 5.

Statutes, see **STATUTES**, 1.

TORTS:

See **TRESPASS**; **TROVER AND CONVERSION**.

Placing diseased animal on premises of other, see **ANIMALS**.

Measure of damages, see **DAMAGES**, 2-9.

Causing death, see **DEATH**.

Of employers, see **MASTER AND SERVANT**.

Remedies against receiver for, see **RECEIVERS**, 1.

TRADE:

Contracts in restraint of, see **CONTRACTS**, 2.

TRANSCRIPTS:

Of record for purpose of review, see **APPEAL AND ERROR**, 10-16; **CRIMINAL LAW**, 10.

TRAPS:

Closing fish traps at certain hours, see **FISH**.

TRESPASS:

1. **TRESPASS—ACTS CONSTITUTING.** The placing of a horse affected with glanders in the barn of another, under a permission to use the barn for horses that had been injured in grading work, is not a trespass. *Farrar v. Peterson & Co.*..... 482

TRIAL:

See **NEW TRIAL**.

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 6, 7.

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 10-16.

Instructions in action to recover money paid to attorney, on ground of fraud, see **ATTORNEY AND CLIENT**, 3.

Instructions in action for injury to passengers, see **CARRIERS**, 4, 5.

Of criminal prosecution, see **CRIMINAL LAW**.

Instructions as to damages for personal injuries, see **DAMAGES**, 7-9.

Condemnation proceedings, see **EMINENT DOMAIN**.

Instructions in action for conversion, see **TROVER AND CONVERSION**, 2.

1. **TRIAL—OBJECTIONS TO EVIDENCE—SCOPE AND QUESTIONS RAISED.** An objection to a hypothetical question of some length, and stating several hypotheses, in that it contained a "mass of irrelevant matter," and that the "hypothesis stated" is not supported by the evidence, is too general; since appellant should have pointed out the matter to be eliminated and wherein the "hypothesis stated" was not borne out by the evidence. *Knutson v. Moe Brothers.*..... 290
2. **TRIAL—OBJECTIONS—DEMURRER ORE TENUS—DECISION.** Defendants have the right to rest upon a demurrer *ore tenus* on the ground that the complaint does not state sufficient facts, even after issue joined by answer; and the court may defer ruling thereon, and sustain the demurrer at the close of the evidence, if proof of the necessary facts be not produced. *Belknap Glass Co. v. Kelleher.*.... 529
3. **TRIAL—MISCONDUCT OF COUNSEL—IMPROPER ARGUMENT.** It is error to refuse to require counsel to desist from "improper and inflammable" statements in regard to negligence which was admitted in the case, and the same may be prejudicial, requiring a new trial, when taken in connection with erroneous evidence admitted, and the fact that the trial judge reduced the verdict as excessive (overruling *Id.*, 67 Wash. 96). *Taylor v. Spokane, Portland & Seattle R. Co.* 378
4. **TRIAL—DIRECTION OF VERDICT.** Where there is no substantial evidence tending to establish the cause of action sued on, it is proper to direct a verdict for the defendant. *Jensen v. Williams Co.*... 606

TRIAL—CONTINUED.

5. TRIAL—MOTION FOR DIRECTED VERDICT—EVIDENCE SUBSEQUENTLY ADMITTED. After a challenge by one of the defendants to the sufficiency of the evidence is overruled, the plaintiff is entitled to the benefit of any evidence that may later be admitted on a trial of the issue against a codefendant; since a plaintiff does not rest at his peril, and may be allowed to reopen his case. *Seattle & Puget Sound Packing Co. v. Seattle*..... 359
6. TRIAL—INSTRUCTIONS—WRITTEN INSTRUCTIONS—WAIVER—EXCEPTIONS—TIME FOR TAKING. Where, in addition to written instructions, an oral explanation was requested and given, without objection or exception at the time, a written exception filed later on the ground that the same was not reduced to writing and given to the jury, comes too late; since the statute authorizing exceptions to instructions at any time before motion for new trial relates to their sufficiency as matter of law, and not to the manner in which they are given, and since the statute requiring the instructions to be given in writing may be waived. *Taylor v. Kidd*..... 18
7. TRIAL—INSTRUCTIONS. An instruction that jurors should follow their own consciences or whatever they believe to be the truth, irrespective of anything else in the case, is an abstract platitude, and erroneous as tending to mislead the jury. *Nilsson v. Martinson*. 286
8. TRIAL—INSTRUCTIONS—REQUESTS. Want of more specific instructions on a subject cannot be objected to in the absence of a request therefor. *Zolawenski v. Aberdeen*..... 95
9. TRIAL—INSTRUCTIONS—REQUEST. Error cannot be predicated on failure to instruct upon the subject of contributory negligence, in the absence of any request therefor. *Zolawenski v. Aberdeen*..... 95
10. TRIAL—INSTRUCTIONS ALREADY GIVEN. It is not error to refuse a requested instruction that is covered in other language in the general charge. *McIlwaine v. Tacoma R. & Power Co.*..... 184

TROVER AND CONVERSION:

1. TROVER AND CONVERSION—MEASURE OF DAMAGES. In an action for the conversion of a house, removed from plaintiff's land, the measure of damages is the value of the house at the time of its removal, with interest, and not the value of the use of the house on the premises from the time of its removal. *Hofreiter v. Schwabland* 314
2. TROVER AND CONVERSION—TRIAL—INSTRUCTIONS. In an action for the conversion of a house, built by partners with joint funds, upon the separate property of the plaintiff, and which, on dissolution of the partnership, was to be divided as personalty, the sole issue being whether defendant's half interest in the house was included in an exchange of properties and passed to the plaintiff, an instruction on the subject of common law fixtures, and casting the burden of proof of ownership of the house on the defendant, is misleading and erroneous. *Hofreiter v. Schwabland*..... 314

TRUSTS:

Recovery by trustee in bankruptcy for unlawful reduction of capital stock, see **CORPORATIONS**, 4-6.

Trust deeds, see **MORTGAGES**, 1.

1. **TRUSTS—EXPRESS TRUSTS—AGREEMENT TO RECONVEY—PAROL PROOF—ADMISSIBILITY.** An express trust which cannot be proved by parol evidence, arises where a son, in order to appease his infirm mother, who believed his marriage changed the title from separate to community property, conveyed property to his mother by deed absolute in form, without consideration, under an agreement that she should immediately reconvey to him, there being no claim of fraud other than the failure of the trustee to perform the express contract; since no fraud inheres in the original transaction, and equity will not raise a constructive trust on mere breach of an express contract to convey. *Arnold v. Hall*..... 50

UNLAWFUL DETAINER:

See **LANDLORD AND TENANT**, 7-9.

VACATION:

See **JUDGMENT**, 1.

Of highways, see **HIGHWAYS**, 3.

VALUE:

Recovery of value of improvements converted by landlord, see **LANDLORD AND TENANT**, 2.

Of leasehold interest in state lands for purpose of taxation, see **TAXATION**, 1.

Increased valuations, notice of, see **TAXATION**, 3.

VARIANCE:

Between facts and hypothetical question, see **EVIDENCE**, 5.

Between ordinance and judgment directing payment for local improvement, see **MUNICIPAL CORPORATIONS**, 7.

Between pleading and proof in civil action, see **PLEADING**, 5.

VENDOR AND PURCHASER:

Purchasers of property fraudulently conveyed, see **FRAUDULENT CONVEYANCES**.

Sale of mineral claims, see **MINES AND MINERALS**.

Transfer of ownership of personal property, see **SALES**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

1. **VENDOR AND PURCHASER—CONTRACTS—AGREEMENT TO PURCHASE OR OPTION—CONSTRUCTION.** A contract acknowledging receipt of the sum of \$100 as part payment upon the purchase price of land, followed by provisions contemplating the consummation of the sale, and providing that the purchaser, if the title shall be found insuf-

VENDOR AND PURCHASER—CONTINUED.

ficient or unsatisfactory, may at his option have the sums paid returned to him, is a contract for the sale and purchase of the land and not an option, notwithstanding a provision that if the title is not subject to objection and the purchaser fails to perform his part of any of the terms of the contract, the sums paid shall be retained by the owner as liquidated damages and the purchaser shall not be under any further liability. *Wright v. Suydam*..... 587

2. **VENDOR AND PURCHASER—CONTRACT—PERFORMANCE OR BREACH—TENDER.** Where a contract for the sale of land made the payment of the balance of the purchase price and the execution of the conveyance mutual, concurrent, and dependent acts, a tender of the purchase price before demand and offer of a deed is in time, although after the time limited in the contract. *Wright v. Suydam*..... 587

3. **VENDOR AND PURCHASER—OPTION—ASSIGNMENTS—ASSUMPTION OF PAYMENTS—LIABILITY TO VENDOR—PRINCIPAL AND AGENT.** An assignment of an option for the purchase of a mine, whereby the assignee agreed to make all the payments called for, does not render the assignee unconditionally liable to the vendor for the payments, where the same were all optional, the option was assignable on its face, and was obtained by the assignor as the agent and for the benefit of the assignee; since the vendor's rights are measured by the terms of the option agreement. *Rockwell v. Edgcomb*..... 694

VENTILATION:

In coal mine, see **MASTER AND SERVANT**, 5.

VENUE:

Review of denial of motion for change of as dependent on record, see **APPEAL AND ERROR**, 11.
Foreclosure, see **MORTGAGES**, 2.

VERDICT:

Review on appeal or writ of error, see **CRIMINAL LAW**, 11.
Inadequate or excessive damages, see **DAMAGES**, 2-6.
Excessive verdict for malpractice, see **PHYSICIANS AND SURGEONS**, 2.
Direction of verdict in civil action, see **TRIAL**, 4, 5.

VESTED RIGHTS:

Of property owners in proceedings initiating public improvement, see **MUNICIPAL CORPORATIONS**, 8.

VOTERS:

See **ELECTIONS**.

WAIVER:

See **ESTOPPEL**.
Right to appeal, see **APPEAL AND ERROR**, 4.
Of rights pending appeal, see **APPEAL AND ERROR**, 5.

WAIVER—CONTINUED.

- Of right to speedy trial, see **CRIMINAL LAW**, 2.
- Of statute requiring presentment of claims against estate, see **EXECUTORS AND ADMINISTRATORS**, 6.
- Objections to information, see **INDICTMENT AND INFORMATION**, 3.
- Of conditions precedent to action on policy, in action for loss from failure to issue renewal policy, see **INSURANCE**, 2.
- Possession by tenant as waiver of right to full performance of building contract, see **LANDLORD AND TENANT**, 4.
- Of constructive eviction, see **LANDLORD AND TENANT**, 5.
- Of statute requiring duplicate statements to owner of material furnished contractor, see **MECHANICS' LIENS**, 3, 4.
- Of right to foreclose one of two separate mortgages in separate action, see **MORTGAGES**, 2.
- Of right of action for waste, see **REMAINDERS**.
- Exceptions or objections to instructions, see **TRIAL**, 6.

WASTE:

- Action for by remainderman, see **REMAINDERS**, 2.

WATERS AND WATER COURSES:

See **NAVIGABLE WATERS**.

Damage to property from water main, see **MUNICIPAL CORPORATIONS**, 23.

1. **WATERS AND WATER COURSES — APPROPRIATION — PRIORITY.** The rights of an appropriator of water for power purposes relate back to the first substantial act for the acquisition of the right if followed up with reasonable diligence, and are superior to the rights of an owner of land which subsequently became riparian by a change in the course of the stream. *Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*..... 631
2. **WATERS AND WATER COURSES—RIPARIAN RIGHTS—FLOW AND USE.** The use of the waters of a stream for power purposes in no way infringes upon the rights of one who has acquired the timber on riparian lands, where such use does not interfere to any extent with the flow of the water to which the land is entitled. *Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*..... 631
3. **SAME.** A lower riparian proprietor cannot insist that there be no diminution whatever of the natural flow of the stream, as each owner is entitled to a reasonable and proper use. *Sumner Lumber & Shingle Co. v. Pacific Coast Power Co.*..... 631
4. **WATERS AND WATER COURSES—EASEMENTS—GRANT BY IMPLICATION —IRRIGATION DITCH.** Where the owner of irrigated land sold part of the tract, after he and his predecessors in interest had created and continuously used a ditch across the land retained, which was reasonably necessary for the beneficial use and enjoyment, of the land sold as an outlet for waste water accruing from the irriga-

WATERS AND WATER COURSES—CONTINUED.

tion thereof, the grantees take an easement in the land retained for the maintenance of the ditch, as located at the time of their conveyance. *Schumacher v. Brand*..... 543

5. **WATERS AND WATER COURSES—EASEMENTS—PRESCRIPTIVE RIGHT—COMMON USE.** An easement for the maintenance of a waste ditch, as an outlet for surplus water used in irrigation, which passes by implication by a conveyance of the dominant estate, is established by prescription, where it appears that there has been continuous, uninterrupted use, along a uniform route, adverse to the owner, while he was able in law to assert and enforce his rights, the use being for irrigation; and it is immaterial that the use was common with others. *Brand v. Lienkaemper*..... 547
6. **SAME—CONTINUOUS USE.** Whether such a use was continuous depends upon whether it was used at such times as it was needed. *Brand v. Lienkaemper*..... 547
7. **SAME — ABANDONMENT — INTENTION — EVIDENCE — SUFFICIENCY.** Abandonment of a waste ditch to carry off surplus water in irrigating land is a matter of intention, and is not shown by the fact that the owners of the dominant estate permitted the owners of the servient estate to temporarily change the course of the ditch for a period of two or three years, the changed location still subserving the purposes of a waste ditch. *Schumacher v. Brand*..... 548
8. **SAME.** An easement in the maintenance of a ditch for irrigation is not lost by the fact that other parties were allowed to make use of it. *Schumacher v. Brand*..... 543

WILLS:

Survival of action to contest, see **ABATEMENT AND REVIVAL**, 2.

WITNESSES:

Experts, see **EVIDENCE**, 4.

Testimony at former trial, see **EVIDENCE**, 6.

Failure to call ground for new trial, see **NEW TRIAL**, 2.

1. **WITNESSES — IMPEACHMENT — COMPETENCY OF WITNESS.** An impeaching witness is not qualified to testify as to the reputation for truth and veracity of another, where he did not know him and merely prosecuted an inquiry for seven days, making inquiry of forty or fifty people. *State v. Miller*..... 174

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS**.

1. **WORK AND LABOR—SERVICES — LIEN — CONTRACT OF EMPLOYMENT.** The vendee under a conditional sales contract, which required him to take care of the property while in his possession, is not entitled to a lien for services in taking care of the property, after its abandonment by a receiver, where he still claimed under the con-

WORK AND LABOR—CONTINUED.

ditional sales contract, and refused to allow the vendor to take possession; and a letter from the vendor notifying him that the receiver's watchman had been let out and "trusting" that he would take some supervision over the property pending adjustment of the matter, cannot be construed as a contract employing him to care for the property. *Burnham v. Washington Machinery Depot*..... 355

2. **WORK AND LABOR—ACTION FOR SERVICE—IMPLIED CONTRACT—EVIDENCE—SUFFICIENCY.** An implied contract to pay for clearing land is not shown, where it appears that plaintiff went upon the land of his son-in-law and used it for crops, from 1904 to 1911, without any request on the part of the defendant, or any demand for pay, or any offer to account for the products, on the part of the plaintiff, although crops were raised every year. *Nilsson v. Martinson*..... 286

8. **WORK AND LABOR—ACTION FOR SERVICES—EVIDENCE—SUFFICIENCY.** In an action for services, the evidence shows that the plaintiff knew he was employed by the S. Company and not by the W. Company, two corporations having a common office and common officers, where he admitted that for nine months he served as foreman for the S. Company, kept its time books, issued time checks and received checks for himself and colaborers upon which plainly appeared the name of the S. Company, and that after leaving such company he worked for and was paid by the W. Company. *Jensen v. Williams Co.* 606

WRITINGS:

Written instructions as part of record on appeal, see **APPEAL AND ERROR**, 14.

Evidence to prove lost writing, see **EVIDENCE**, 3.

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**.

WRITS:

See **CERTIORARI**; **EXECUTION**; **INJUNCTION**.

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